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Provisional summary record of the 3447th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 7 August 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.917/Add.1.

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) (continued)

Paragraph (20)

The Chair recalled that, at the previous meeting, paragraph (20) of the commentary to draft conclusion 7 had been left in abeyance pending consultations between the Special Rapporteur and another member of the Commission. He invited the Special Rapporteur to report on the outcome of those consultations.

Mr. Nolte (Special Rapporteur) said that, having consulted Mr. Murphy, he suggested the deletion of the first two sentences of the paragraph, which would then begin "It may be appropriate …". The remainder of the sentence would be unchanged. Footnote 281 would also be deleted and its contents moved to the end of footnote 282, prefaced by the words "See also".

Paragraph (20), as amended by the Special Rapporteur, was adopted.

Paragraph 3 – Interpretation versus modification or amendment

Sir Michael Wood suggested that, in the heading above paragraph (21), the order of "modification or amendment" should be reversed, to match the order in which they were presented in the 1969 Vienna Convention on the Law of Treaties. The Commission employed those terms randomly, but they were used in the Convention, rather artificially, to mean two quite different things; amendment signified something agreed by all the parties and modification signified something agreed among only some of the parties.

The Chair said that the Secretariat and the Special Rapporteur would be asked to check the references to amendment and modification in the commentary and adjust them where necessary.

It was so decided.

Paragraphs (21) to (32)

Paragraphs (21) to (32) were adopted.

Paragraph (33)

Sir Michael Wood invited the Special Rapporteur and the Secretariat to check the quotation in paragraph (33), which was actually taken from *Al-Saadoon and Mufdhi v. the United Kingdom* and which incorporated a reference to *Soering v. the United Kingdom*. In fact, it would be better to shorten the quotation, by deleting the initial phrase and keeping only a reference to *Soering*. The footnote should then cite *Soering*.

Mr. Murphy said that he agreed with the idea of focusing on the *Soering* case and citing that judgment of the European Court of Human Rights. The footnote relating to *Soering* should contain language which indicated that the Court had ultimately decided that there had been no amendment or modification of the European Convention on Human Rights. The introductory sentence of the following paragraph would then have to be reformulated, because the Court was in fact applying the reasoning from *Öcalan v. Turkey*.

Mr. Nolte (Special Rapporteur) said that the comments by Sir Michael Wood and Mr. Murphy were partly technical and partly substantive. The deletion of the first phrase in the quotation raised a substantive issue, because that phrase was important.

Sir Michael Wood said that, if that phrase was retained, the introduction should read "In the *Al-Saadoon and Mufdhi* case, the Court held …".

It was so decided.

Paragraph (33), as amended, was adopted.

Paragraph (34)

Mr. Murphy said it was his understanding that the Special Rapporteur had agreed that two sentences should be inserted from the *Al-Saadoon and Mufdhi* case and that the introductory sentence to the quotation might need to be adjusted accordingly. He took it that the Special Rapporteur would make the necessary changes.

Paragraph (34) was adopted on that understanding.

Paragraph (35)

Paragraph (35) was adopted.

Paragraph (36)

Sir Michael Wood said that the third sentence seemed to be highly speculative and a deduction from reading various judgments. The third and fourth sentences should either be deleted or the beginning of the third sentence should read "The conclusion could perhaps be drawn …".

The Chair said that it seemed rather pretentious to interpret the jurisprudence of the International Court of Justice without any solid foundation for doing so. He was therefore in favour of the amendment suggested by Sir Michael Wood and would prefer to end the paragraph after the quotation and footnote indicator in the third sentence.

Mr. Nolte (Special Rapporteur) said that the paragraph, which had previously been accepted by the Commission, was trying to express a balanced conclusion. It was not speculative, because it quoted a finding of the International Court of Justice. References had been made to interpretations of the Court which had stretched the ordinary meanings of words, but which were nevertheless permissible interpretations. The whole point of the commentary was to explain that there was an interrelationship between the possibility of interpretation and the possibility of modification and the reasons why modification or amendment by subsequent practice would not be accepted as influencing the way a treaty could be interpreted. He could agree to say in the last sentence "The Court seems to prefer …" in order not to be too categorical.

The Chair said he was concerned that the last sentence was couched in such general terms that it might seem to imply that it was the policy of the Court to accept broad interpretations in every case, whereas the Commission was referring to just one particular case.

Sir Michael Wood, supported by **Mr. Saboia**, said that he still disagreed with the final sentence. The Court would not be happy if it thought that the Commission was of the opinion that it stretched the ordinary meaning of the terms of a treaty. Therefore he still preferred to delete the last two sentences of the paragraph. Alternatively those two sentences could be replaced by one which included the quotation and which simply said: "No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice; however, the Court has stated that modification of a treaty by subsequent practice 'cannot be wholly precluded as a possibility in law'."

Mr. Nolte (Special Rapporteur) said that the paragraph was important, as it summarized the contents of the previous paragraphs. He proposed that the final sentence should read: "Instead, the Court seems to prefer to accept broad interpretations of the ordinary meaning of the terms of a treaty." He also agreed to start the third sentence with the wording "The conclusion could perhaps be drawn".

Paragraph (36), as amended, was adopted.

Paragraph (37)

Paragraph (37) was adopted.

Paragraph (38)

Mr. Murphy said that the paragraph was an important one, as it summed up the Commission's view on the possibility of using subsequent practice to amend or modify a treaty. He personally believed that, generally speaking, such a step was impossible, but the preceding paragraphs discussed the theoretical possibility of such action. The final clause of the first sentence was very weak and should be replaced with "the possibility of amending or modifying a treaty by subsequent practice has not been generally recognized". The last two sentences of the paragraph were also problematic, as they indicated that the interpreter might find other ways to modify a treaty. The Commission should not invite interpreters to use creative techniques to modify or amend a treaty. Those two sentences were superfluous and should be deleted.

Mr. Park said that the amendments proposed by Mr. Murphy would upset the balance of the wording agreed in the Drafting Committee.

Mr. Nolte (Special Rapporteur) said that paragraph (38) attempted to balance the various positions adopted on earlier occasions when the text had been discussed. He therefore disagreed with the proposal to delete the two last sentences, because they restated the proposition that rules of interpretation might lead to either a broader or a more limited interpretation and that all means of interpretation needed to be taken into account. Moreover, the last sentence provided a link with the following draft conclusion regarding the possibility of evolutive interpretation. He was prepared to add the sentence: "The actual occurrence and the possibility of amending or modifying a treaty is not to be presumed and has not generally been recognized." At such a late stage in proceedings, it would be inadvisable to upset the careful balance of the text.

Sir Michael Wood said that he felt quite uncomfortable agreeing to language which he did not fully understand. The last two sentences were unnecessary and missed the central point made in the paragraph. He was therefore in favour of their deletion. He agreed with Mr. Murphy that the phrase "is not to be presumed" was extremely weak. Perhaps it would be better to quote the more positive language used by the International Court of Justice, namely "cannot be wholly precluded".

Mr. Murphy, supported by **Mr. Tladi**, said that, while he agreed with Sir Michael Wood with regard to deleting the last two sentences, it was not clear how the amendment just proposed by him would work. The language which he himself had suggested echoed that in paragraph (21) which the Commission had just adopted and which was equally appropriate to the concluding paragraph of the commentary to draft conclusion (7).

Mr. Nolte (Special Rapporteur) said that the beginning and end of an analysis were not necessarily identical. The reference to the presumption should be included because both that presumption and the manner in which a treaty should be interpreted were related to the reason why modification by subsequent practice had not been generally recognized. It would therefore be wise to reflect the reasoning behind the draft conclusion. In order to move forward, he proposed that the final phrase of the first sentence should read "the actual occurrence of that effect and the possibility of amending or modifying a treaty by subsequent practice is not to be presumed and has not been generally recognized".

Mr. Park said that, in the light of the debate, he wished to retain the last two sentences.

Mr. Nolte (Special Rapporteur) said that, in order to accommodate the concerns of Sir Michael Wood and Mr. Murphy, the phrase, "including a possible evolutive interpretation of the treaty provision concerned" could be added to the end of the penultimate sentence.

Mr. Murphy said that the paragraph created an imbalance in the summing up of the section. If the Special Rapporteur felt strongly about retaining the last two sentences, they could be moved to a footnote.

Mr. Nolte (Special Rapporteur) said that he wondered why, if those two sentences were acceptable in a footnote, they should not be included in the text of the paragraph.

Mr. Murphy said that, ideally, they would not be placed in either a footnote or the text. Having them in the text would suggest that interpreters should seek to find creative ways, within the means of interpretation and by availing themselves of evolutive interpretation, to change a treaty. States had rejected that possibility at the United Nations Conference on the Law of Treaties, they still disliked it and it was generally deemed to be a step too far. For that reason, it would be inadvisable to end the paragraph summing up the commentary to draft conclusion 7 by expressing those ideas. If it would not be helpful to move them to a footnote, they should simply be deleted.

Mr. Nolte (Special Rapporteur) said that in 1968 States had rejected the possibility of modification by subsequent practice, whereas the two sentences at issue concerned interpretation in the light of subsequent practice. If, however, the only possibility of saving those two important sentences was to place them in a footnote, he was prepared to do so.

Paragraph (38), as amended, was adopted.

The commentary to draft conclusion 7, as a whole, as amended, was adopted.

Commentary to draft conclusion 8 (Interpretation of treaty terms as capable of evolving over time)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

Mr. Murphy suggested that, in the fourth sentence of the paragraph, the two phrases in quotation marks should be separated by a comma, not "or", and the second quotation should be followed by "and sacred trust". The following sentence should then be recast to read: "The International Court of Justice, in its *Namibia* opinion, gave 'sacred trust' an evolving meaning so as to conclude 'that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned'."

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (15)

Paragraphs (7) to (15) were adopted.

Paragraph (16)

Mr. Murphy suggested that, in line with the Commission's usual practice, the word "jurisprudence" in the second sentence should be changed to "pronouncement", as it referred to the output of a human rights treaty body.

Mr. Nolte (Special Rapporteur) said that a term was needed that conveyed the sense of accumulated practice, rather than simply a sequence of pronouncements.

Mr. Rajput, pointing out that paragraph (18) referred to "the jurisprudence of international courts and tribunals and the pronouncements of expert treaty bodies", said that the same terms should be used in the interests of consistency, unless otherwise required by context.

Sir Michael Wood expressed the view that no change was needed, especially as the paragraph went on to quote the treaty body in question referring to its own "jurisprudence".

Mr. Murphy said that the term "pronouncement" was used consistently in relation to treaty bodies; the Commission had explained elsewhere why the term "jurisprudence" should be avoided in that context. Wording such as "the Committee abandoned its pronouncements" might address Mr. Nolte's concern.

Mr. Saboia said that the Commission should be more liberal in its use of the word "jurisprudence", particularly as it appeared in the quotation that followed.

Mr. Park, expressing support for Mr. Murphy's comments, suggested using the word "views", as in the official citation given in footnote 358.

The Chair suggested wording to the effect that the Committee had "abandoned its repeated pronouncements based on *Kindler*".

Mr. Saboia proposed using the words "pattern of pronouncements".

Mr. Nolte (Special Rapporteur) said that he could accept either of the proposals made by Mr. Saboia and the Chair but would prefer the words "repeated pronouncements".

Mr. Ouazzani Chahdi emphasized the need to ensure that the various language versions of the text were accurate and consistent.

The Chair said he took it that the Commission agreed to amend paragraph (16) along the lines he had suggested, for which the Special Rapporteur had expressed a preference.

Paragraph (16), as amended, was adopted.

Paragraph (17)

Mr. Rajput said that the paragraph faithfully represented the views of the international arbitral tribunal under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* and the evolution of relevant practice; however, the fact that the Convention contained no definition of "investment" meant that such evolution had not occurred in the context of the Convention as such. He would be happy to provide additional information so that the paragraph could be amended accordingly, particularly in terms of how the quotation was presented.

Mr. Nolte, welcoming that clarification, requested that the paragraph be left in abeyance to allow him to consult Mr. Rajput and find an appropriate solution.

The Chair said he took it that the Commission agreed to that suggestion.

It was so decided.

Paragraph (18)

Mr. Nolte (Special Rapporteur) suggested that, in the light of the discussion on the terms "jurisprudence" and "pronouncements" in relation to paragraph (16), the definite article should be deleted before the word "pronouncements" in the first sentence of paragraph (18) so as to make the reference more general.

Paragraph (18), as amended, was adopted.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

Commentary to draft conclusion 9 (Weight of subsequent agreements and subsequent practice as a means of interpretation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Murphy said that the paragraph dealt with the jurisprudence of the European Court of Human Rights but appeared to extrapolate certain notions to cover the whole field of human rights. He suggested that the purely European context be clarified by altering the words "human rights treaties", in the second sentence, to a specific reference to the

Convention for the Protection of Human Rights and Fundamental Freedoms and, in the third sentence, changing "the national legislation of States parties" to "the national legislation of its States parties", referring back to that Convention.

Mr. Nolte (Special Rapporteur) said that the passage in question was intended to encapsulate a general point. Common elements in the legislation of States could be relevant in determining the scope of a human right or the necessity of restricting it. The issue was not specific to the European Court of Human Rights.

The Chair said that, as drafted, the paragraph gave the impression of referring only to the European context. For consistency, it should either be supplemented by references to other regional human rights systems or amended as suggested by Mr. Murphy.

Mr. Nolte (Special Rapporteur) said that, on reflection, and in the light of the Chair's comments, he could accept Mr. Murphy's suggestions; for the sake of clarity, the words "its States parties" could be further amended to "its member States".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Nolte (Special Rapporteur) said that Mr. Park had enquired, informally, whether a more appropriate term than "unmindful" might be used in the third sentence. In his view, the existing text was clear, but he was open to suggestions on how it might be improved.

The Chair said that, in the absence of any comments, he took it that the Commission agreed to adopt the paragraph as it stood.

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Nolte (Special Rapporteur) relayed a suggestion made informally by Mr. Park to change the term "collective practice" to "common practice" in the second sentence of the paragraph, with which he agreed.

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Paragraph (11)

Mr. Nolte (Special Rapporteur) said that Mr. Park had asked him informally about whether the term "one-off practice" should be changed to "one-time practice" in the last sentence of the paragraph. He would prefer the former, which he felt carried more of the connotation of something unintentional.

Mr. Park said that altering the term to "one-time practice" would be consistent with paragraph (36) of the commentary to draft conclusion 4.

The Chair said he took it that the Commission agreed to Mr. Park's suggestion.

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (14)

Paragraphs (12) to (14) were adopted.

Paragraph (15)

Paragraph (15) was adopted with a minor editorial change.

Commentary to draft conclusion 10 (Agreement of the parties regarding the interpretation of a treaty)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Nolte (Special Rapporteur) relayed a suggestion made informally by Mr. Tladi to insert the words "regarding interpretation" after "Conflicting positions" in the first sentence. While he did not consider such a change necessary, he did not object to it.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Murphy suggested that the last sentence of paragraph (4) should be deleted: by singling out a particular group of treaties — those relating to human rights or refugees — it seemed to contradict the statement in paragraph (15) of the commentary to draft conclusion 2 that the Commission had decided not to refer to the "nature" of a treaty in order not to call into question the unity of the interpretation process and to avoid any categorization of treaties. Moreover, it had no basis in the 1969 Vienna Convention and no citations were given.

Mr. Nolte (Special Rapporteur) said that there was a difference between undermining the unity of the interpretation process and giving examples by referring to a specific group of treaties. In the present case, reference was made to human rights treaties as the clearest illustration of the point that variation among States in the application of a particular instrument should not be taken as disagreement as to the interpretation thereof; rather, States exercised the discretion provided for in the instrument in different ways.

Sir Michael Wood said that the sentence in question presented problems of form and content. Semantically, it was odd to talk of treaties themselves "aim[ing] at a uniform interpretation". In terms of content, the notion of treaties "characterized by considerations of humanity or other general community interests" was unusual and unclear. The concept of "a margin of appreciation for the exercise of discretion by States" was familiar in the European context of the Convention for the Protection of Human Rights and Fundamental Freedoms but inappropriate if read in conjunction with the reference to treaties on refugees. The issues of content might be overcome by amending the sentence to read: "Some treaties tend to aim at a uniform interpretation but also leave a margin of appreciation for the exercise of discretion by States."

Mr. Nolte (Special Rapporteur), while acknowledging Sir Michael Wood's concerns, said that referring to "some treaties" would rob the sentence of its purpose, which was to provide an example. He suggested instead that it could be altered to read: "Treaties relating to human rights, for example, tend to aim at a uniform interpretation but also leave a margin of appreciation for the exercise of discretion by States." If "margin of appreciation" was felt to be too European a concept, the words "to leave room for" could be used.

Ms. Lehto said that the concept of "considerations of humanity" had been used previously by both the Commission and the International Court of Justice; however, she had no objection to the reformulation proposed by the Special Rapporteur.

Mr. Murphy said that the aim of uniform interpretation was common to all treaties, even if some allowed for the exercise of discretion; however, the Special Rapporteur's proposal was an improvement on the text as drafted.

The Chair said he took it that the Commission agreed to amend the sentence to read: "Treaties relating to human rights, for example, tend to aim at a uniform interpretation but also leave room for the exercise of discretion by States."

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

Mr. Nolte (Special Rapporteur) relayed a suggestion made informally by Mr. Park that, in footnote 409, the term "single common act" should be altered to "common act".

With that amendment to footnote 409, paragraph (7) was adopted.

Paragraph (8)

Mr. Murphy pointed out that, while mention was made of the Bechuanaland authorities in paragraph (8), there was no reference to the Caprivi authorities. He suggested that the second part of the third sentence be altered to read: "... the 'Bechuanaland authorities were fully aware of and accepted' the interpretation of the Caprivi authorities with respect to the treaty boundary."

Sir Michael Wood suggested that, in the first sentence, it should be specified that articles 31 (3) (a) and (b), not (c), of the 1969 Vienna Convention were meant. He sought clarification of the link between the first sentence and the second and the interplay between the requirement for awareness and acceptance of the position of the other party or parties and the character of the treaty obligation in question.

Mr. Nolte (Special Rapporteur) said that some changes had been introduced to the paragraph in the light of the debate that had taken place in the first part of the session. Mr. Murphy had argued that mutual awareness of practice was not always required. States could have a uniform practice in relation to a treaty implemented at the national level without exchanging information on their implementation of the treaty, and courts would be required to take such practice into account. However, that was true only in certain circumstances, and the language used in the paragraph was thus rather cautious. The *Kasikili/Sedudu Island* case had been referenced in order to draw attention to the requirements that had to be met in order to establish subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention.

Sir Michael Wood proposed that the second sentence should be deleted, as the character of the treaty obligation in question was not the only factor that determined the conditions that had to be met in order to establish that an agreement under article 31 (3) of the Convention was "common".

Mr. Tladi said that, in the relevant paragraph of its judgment, the International Court of Justice had made clear that the full awareness and acceptance of the Bechuanaland authorities was indeed a requirement. The language proposed by Mr. Murphy accurately reflected the text of that paragraph of the judgment and could therefore be accepted by the Commission.

Mr. Nolte (Special Rapporteur) said that he accepted Mr. Murphy's and Sir Michael Wood's proposals.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

Paragraph (10) was adopted with a minor editorial change.

Paragraphs (11) to (24)

Paragraphs (11) to (24) were adopted.

The commentary to draft conclusion 10 as a whole, as amended, was adopted.

Part Four (Specific aspects) Commentary to draft conclusion 11 (Decisions adopted within the framework of a Conference of States Parties)

Paragraphs (1) to (22)

Paragraphs (1) to (22) were adopted.

Paragraph (23)

Mr. Murphy proposed that a sentence break should be inserted after the words "article 31, paragraph 3 (a)" in the first sentence, as none of the preceding examples demonstrated that decisions of conferences of States parties might give rise to subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention or to other subsequent practice under article 32.

Mr. Nolte (Special Rapporteur) said that he was reluctant to accept that proposal. It was obvious that such decisions could give rise to subsequent practice under article 31 (3) (b) of the Convention or to other subsequent practice under article 32. The use of the word "may" already ensured some degree of caution.

The Chair said that one solution might be to repeat the word "may".

Sir Michael Wood suggested that Mr. Murphy's proposal could be implemented by replacing the words "and give rise to" at the beginning of the new sentence with "They may also give rise to". That suggestion would make it clear that, although it was possible that decisions of conferences of States parties could give rise to subsequent practice under article 31 (3) (b) of the Convention or to other subsequent practice under article 32, the preceding examples did not necessarily demonstrate that possibility.

Mr. Murphy said that he accepted Sir Michael Wood's suggestion, but he would prefer to begin the new sentence with the words "Such decisions" instead of "They".

Paragraph (23), as amended, was adopted.

Paragraphs (24) to (27)

Paragraphs (24) to (27) were adopted.

Paragraph (28)

Mr. Murphy proposed that the words "as long as it reflects the agreement of all the parties" should be inserted at the end of the second sentence, as paragraph (28) was the first paragraph of the commentary to draft conclusion 11 to address its third paragraph specifically.

Mr. Nolte (Special Rapporteur) said that Mr. Murphy's proposal would distract from the main focus of the second sentence, namely the distinction between substance and form. In addition, the same information had already been repeated ad nauseam. As a compromise, he proposed that the words "among all the parties" should be inserted after "agreements" in the first sentence.

Sir Michael Wood asked whether the language proposed by the Special Rapporteur covered article 31, paragraph 3, of the 1969 Vienna Convention in general or article 31, paragraph 3 (a), specifically.

Mr. Nolte (Special Rapporteur) said that it related to article 31, paragraph 3, of the Convention in general.

Paragraph (28), as amended, was adopted.

Paragraphs (29) to (37)

Paragraphs (29) to (37) were adopted.

Paragraph (38)

Mr. Murphy proposed deleting, in the first sentence, the words "that are adopted by consensus", which unnecessarily limited the range of resolutions covered in the paragraph, and inserting the word "legally" before "binding", which would ensure consistency with the rest of the paragraph. With regard to the last sentence, he proposed replacing the reference to article 31, paragraph 3 (a), of the 1969 Vienna Convention with a reference to article 31, paragraph 3, of that Convention.

Mr. Nolte (Special Rapporteur) said that he could accept all three of Mr. Murphy's proposals. With regard to the third of those proposals, it could be argued that, if not all States parties agreed with an interpretative resolution, it would constitute State practice under article 31 of the Convention.

Mr. Park said that it made no sense to delete the words "that are adopted by consensus" from paragraph (38) because draft conclusion 11 (3) included the words "including adoption by consensus". As an alternative, he proposed that the words "that are adopted by consensus" should be replaced with "including those that are adopted by consensus".

Mr. Murphy said that the context of paragraph (38) of the commentary was different from that of draft conclusion 11 (3). In the first sentence of paragraph (38), there was no need to specify that even resolutions adopted by consensus were included. The general message of draft conclusion 11 (3) was that any decision of a conference of States parties, regardless of its form, might be relevant as a subsequent agreement or subsequent practice. If the Commission wished to introduce the notion of consensus into paragraph (38), it would be necessary to incorporate additional language from the draft conclusion. However, he would prefer not to do so, as the aim of paragraph (38) was to sum up the commentary to draft conclusion 11 as a whole.

Mr. Park said that the word "adoption" had been inserted into the text of draft conclusion 11 (3) at an earlier stage in order to accommodate the concerns of certain Commission members, including Mr. Murphy.

Mr. Nolte (Special Rapporteur) said it was true that the reference to consensus in paragraph (38) was not the same as that in previous paragraphs. However, the notion of consensus had been discussed at length in previous paragraphs and should therefore be mentioned in paragraph (38). It was a matter of emphasis, and the acceptance of Mr. Park's proposal would do no harm.

Mr. Murphy said that, on the contrary, Mr. Park's proposal would represent a distortion of what had been agreed in the Commission. Although he would be prepared to accept a decision to incorporate additional language from draft conclusion 11 (3), including a reference to the form and procedure by which a decision was adopted, he was not prepared to accept a decision to incorporate only a few words of that draft conclusion out of context.

Mr. Nolte (Special Rapporteur) said that he was uncomfortable with the repetition of the same information in multiple paragraphs. He was prepared to accept either the deletion of the words "that are adopted by consensus" or the replacement of those words with "including those that are adopted by consensus". However, he did not understand Mr. Murphy's concern. He proposed that the discussion of the paragraph should be left in abeyance in order to give Mr. Murphy and Mr. Park the opportunity to engage in informal consultations on the paragraph.

The Chair said he took that the Commission wished to leave paragraph (38) in abeyance pending the outcome of those informal consultations.

It was so decided.

Commentary to draft conclusion 12 (Constituent instruments of international organizations)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

Paragraph (14)

Mr. Murphy proposed that footnote 535 should be deleted, as the Convention on International Civil Aviation was not "implemented" by bilateral air transport agreements.

Mr. Nolte (Special Rapporteur) said that the word "implemented" was used in the body text to reflect the fact that the goals of the constituent instruments of international organizations were sometimes realized by subsequent bilateral or regional agreements or practice. He wondered whether a more appropriate word than "implemented" could be found.

The Chair suggested that the word "followed" could be used instead of "implemented".

Sir Michael Wood said that bilateral services agreements were entirely voluntary under the Convention on International Civil Aviation. It would be wrong to say that such agreements "implemented" that Convention.

Mr. Murphy said that, as he understood it, the claim being made in the paragraph was that bilateral or regional agreements were relevant to the interpretation of constituent instruments of international organizations. He objected not to the use of the word "implemented" in the body text but to the example of the Convention on International Civil Aviation in the footnote.

The Chair said that the third sentence of the paragraph seemed to explain the situation.

Mr. Nolte (Special Rapporteur) said that, in a sense, the "subsequent bilateral or regional agreements" referred to in the second sentence of the paragraph sought to "flesh out" the constituent instrument and might thereby contribute to its interpretation. However, he would not insist on retaining the footnote.

Mr. Park said that the first line of the footnote should be deleted in any case, as it could not be said that bilateral agreements constituted or reflected subsequent agreements in relation to the interpretation of the Convention on International Civil Aviation.

Paragraph (14) was adopted, subject to the deletion of footnote 535.

Paragraph 2 — subsequent agreements and subsequent practice as "arising from" or "being expressed in" the reaction of States parties

Mr. Murphy proposed that, in the heading above paragraph (15), the words "reaction of States parties" should be replaced with the words "practice of an international organization", in order to align the heading with the wording of paragraph 2 of draft conclusion 12.

The Chair suggested that, rather than replace "reaction of States parties", the words "to the practice of international organizations" should be added to the end of the heading.

Mr. Murphy said that he stood by his original proposal; however, if it was considered necessary to include a reference to States parties in the heading, he would suggest referring to "subsequent agreements and subsequent practice of States parties as 'arising from' or 'being expressed in' the practice of an international organization".

Mr. Nolte (Special Rapporteur) said that he agreed with Mr. Murphy's revised proposal.

The Chair said he took it that the Commission agreed to change the heading as proposed by Mr. Murphy.

It was so decided.

Paragraph (15)

Mr. Murphy said that it was necessary to redraft the final sentence because it failed to capture the two aspects described in the paragraph. Alternatively, the sentence could be deleted, since it was not substantive in nature.

Mr. Nolte (Special Rapporteur) proposed that the paragraph should be held in abeyance to allow additional time for consultations.

It was so decided.

Paragraphs (16) to (34)

Paragraphs (16) to (34) were adopted.

Paragraph (35)

Sir Michael Wood proposed the deletion of footnote 571 because he considered it out of place in commentaries drafted by the Commission. If that proposal was not acceptable, the final reference cited in the footnote should be deleted, as it was not appropriate.

Mr. Nolte (Special Rapporteur) said that the footnote referred to one of the big questions of international institutional law, namely the possible "constitutional" interpretation of the constituent instruments of international organizations. He would therefore prefer to retain it.

The Chair said that the final reference cited in the footnote was a work by Sir Michael Wood, who, as a member of the Commission had taken part in the consideration of the topic and in the adoption of the draft conclusions. Its inclusion in footnote 571 in relation to a draft conclusion that the Commission would adopt unanimously might be awkward. He therefore agreed that the final reference in the footnote should be deleted; however, the rest of the footnote should be retained.

With that amendment to footnote 571, paragraph (35) was adopted.

Paragraphs (36) to (42)

Paragraphs (36) to (42) were adopted.

Commentary to draft conclusion 13 (Pronouncements of expert treaty bodies)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Tladi said that the first sentence expressed an empirical statement that might not be true, and, in fact, was probably not true, since, even though members of an expert body acted in their individual capacity, they sometimes did receive governmental instructions. He therefore proposed the replacement of the words "free from governmental instructions" with "do not represent States". That was an empirically and normatively true statement that could safely be made.

The Chair said that due consideration should be given to the situation in which members of expert treaty bodies were the persons who issued instructions in their respective foreign ministries.

Mr. Nolte (Special Rapporteur) said it was true that there were independent experts who were under governmental instructions, even if they were not supposed to be. The statement "are free" was not a factual statement but rather a normative one. The usual understanding was that, in order to be independent, a member of an expert treaty body

needed to be free from governmental instructions. If the Commission hesitated to state that, it risked calling its own integrity into question.

Mr. Tladi said that the Special Rapporteur had talked of being "independent". Certainly when one was independent, it meant that one was acting in a manner that was free from governmental instructions. But the expression "serving in their personal capacity" did not necessarily mean that, even if that was what it should mean.

Mr. Jalloh said that, since footnote 596 referred to article 28 (3) of the International Covenant on Civil and Political Rights, which, in turn, indicated that "the members of the Committee shall be elected and shall serve in their personal capacity", perhaps the Commission should avoid getting into a debate about what was meant by that expression.

Mr. Nolte (Special Rapporteur) said that the Commission must explain what "serving in their personal capacity" meant, and it obviously meant that one was free from governmental instructions.

Sir Michael Wood said that the expression "serving in their personal capacity" meant that the members of an expert treaty body were free, not only from governmental instructions, but all instructions — including those of non-governmental organizations, for example — when they acted in that capacity. He proposed that the words "free from governmental" in the first sentence should be replaced with the words "not subject to".

Mr. Rajput proposed that the words "are free from" should be replaced with the words "that do not function under".

Mr. Saboia said that Mr. Rajput's proposal went in the right direction, but he preferred Sir Michael Wood's proposal because it was broader. There were indeed influences that went beyond governmental instructions that should also be avoided.

Mr. Jalloh supported Sir Michael Wood's proposal, as it made the paragraph stronger and appeared to address Mr. Tladi's concern.

Paragraph (3), as amended by Sir Michael Wood, was adopted.

Paragraph (4)

Mr. Tladi said that he had some difficulty with the statement in the second sentence. It was hard to accept, for example, that the Commission's draft conclusions on the current topic could be said to be the pronouncement of the United Nations on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. Consequently, he would propose the deletion of the second sentence.

Mr. Nolte (Special Rapporteur) said that the International Law Commission was a body which was an organ of the United Nations, and its draft conclusions were therefore attributable to the United Nations and not to any State or other subject of international law.

Mr. Tladi said that he did not agree that the reports of the special rapporteurs, for example, were attributable to the United Nations.

The Chair said that the second sentence referred to the output of a body that was an organ of an international organization, which presupposed a process, which in the Commission's case, involved the submission of reports by special rapporteurs. However, those reports were not the Commission's output. Its output would consist, in the current case, of the text of the draft conclusions, as adopted on second reading, which represented many years of elaboration. It should be recalled that the Commission had been established as a means of undertaking a mandate of the General Assembly under the Charter of the United Nations. It would be difficult to find a more direct connection to the United Nations than that relating to the Commission.

Sir Michael Wood said that he found the second sentence to be problematic for the same reasons that Mr. Tladi did. It was also unnecessary, as the position taken in it was explained very well in the rest of the paragraph. The Commission had taken a pragmatic decision not to deal with the practice of international organizations and to limit its study to the expert treaty bodies that were not organs of an international organization. But it had not

done so for the reason given in the second sentence, and nothing would be lost by deleting it.

Mr. Nolte (Special Rapporteur) agreed with deleting the second sentence but suggested keeping the part of footnote 599 that related to the Working Group on Arbitrary Detention and transposing it to footnote 598, as it was important to give examples of expert treaty bodies that were not covered by draft conclusion 13.

Paragraph (4), as amended by the Special Rapporteur, was adopted.

Paragraph (5)

Mr. Park said that the number and date of the resolution referred to in footnote 600 was incorrect: the Economic and Social Council had established the Committee by its resolution 1985/17 of 28 May 1985.

The Chair said that the Secretariat would correct footnote 600 as necessary.

Paragraph (5), as amended, was adopted on that understanding.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Park said that the last sentence of the paragraph referred to bodies that might be authorized to interpret treaties other than those under which they were established. However, the Committee on Economic, Social and Cultural Rights did not fit that category, since it had not been established under a treaty. He therefore wondered if the example provided in footnote 612 was appropriate.

Mr. Nolte (Special Rapporteur) said that, in footnote 612, reference was made to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, and thus to a treaty that was not the treaty that the Committee usually interpreted. Perhaps the reference to General Assembly resolution 63/117, to which the Optional Protocol was annexed, was the source of the misunderstanding. To remedy that, he suggested the deletion of the reference to the resolution in the footnote.

With that amendment to footnote 612, paragraph (7) was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The meeting rose at 6 p.m.

Provisional

For participants only

18 October 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3448th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 8 August 2018, at 10 a.m.

Contents

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

Chapter VI. Protection of the atmosphere

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Please recycle

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jaʻloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV contained in document A/CN.4/L.917/Add.1, beginning with those paragraphs that had been left in abeyance.

Part Three (General aspects) (*continued*)

Commentary to draft conclusion 8 (Interpretation of treaty terms as capable of evolving over time) (*continued*)

Paragraph (17) (*continued*)

Mr. Nolte (Special Rapporteur) said that, following consultations with Mr. Rajput, he wished to propose that the second sentence of paragraph (17), together with the quoted text, should be deleted. The marker to footnote 362 should then be moved to the end of the first sentence, and the footnote itself should be amended to begin with the word "See".

Paragraph (17), as amended, was adopted.

The commentary to draft conclusion 8 as a whole, as amended, was adopted.

Part Four (Specific aspects) (*continued*)

Commentary to draft conclusion 11 (Decisions adopted within the framework of a Conference of States Parties) (*continued*)

Paragraph (38) (*continued*)

Mr. Nolte (Special Rapporteur) said that, following consultations with Mr. Park and Mr. Murphy, he wished to propose that, in the first sentence, the words "that are adopted by consensus" should be deleted. In the same sentence, the word "legally" should be inserted before "binding". In the second sentence, the reference to the 1969 Vienna Convention should be extended to read "under article 31, paragraph 3 (a), (b) and (c)".

Paragraph (38), as amended, was adopted.

The commentary to draft conclusion 11 as a whole, as amended, was adopted.

Commentary to draft conclusion 12 (Constituent instruments of international organizations) (*continued*)

Paragraph (15) (*continued*)

Mr. Nolte (Special Rapporteur) said that, following consultations with Mr. Murphy, he wished to propose that, in the final sentence, the words "or arising from" should be inserted before "an international organization". In the same sentence, the word "reflect" should be replaced with "be relevant for the identification of". In footnote 536, the words "in addition to arising from, or being expressed in, an agreement of the practice of the parties themselves under paragraph 2" should be deleted and replaced with "itself".

Paragraph (15), as amended, was adopted.

The commentary to draft conclusion 12 as a whole, as amended, was adopted.

Commentary to draft conclusion 13 (Pronouncements of expert treaty bodies) (*continued*)

The Chair invited the Commission to resume its consideration of the commentary to draft conclusion 13.

Paragraph (9)

Mr. Murphy said that, in the first sentence, the words "a subsequent agreement or" should be inserted after "constitute". In the same sentence, the reference to the 1969 Vienna Convention should be extended to read "under article 31, paragraph 3 (a) or (b)" and the words "an agreement of the parties or" should be inserted after "requires". In the second sentence, the words "of States parties" should be inserted after "reaction".

Paragraph (9), as amended, was adopted.

Paragraph (10)

Mr. Park said that paragraph (10) appeared to say the opposite of paragraph (9). In the first sentence of paragraph (10), the word "when" should be replaced with "after".

Paragraph (10), as amended, was adopted.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

Paragraph (13)

Mr. Park said that, in the final sentence, the word "would" should be replaced with "may", to align it with the final sentence of paragraph (14).

Mr. Nolte (Special Rapporteur), pointing out that the word "would" should be read together with the conjunction "if" later in the sentence, said that the sentence as currently formulated in fact said what Mr. Park wanted it to say. It would be preferable therefore to retain the original formulation.

Mr. Rajput said that he supported Mr. Nolte's position, since using the word "may" would change the entire complexion of the sentence.

Mr. Park pointed out that the final sentence of paragraph (14) was almost identical to the final sentence of paragraph (13), except that it contained the formulation "depending on" instead of "if".

Mr. Rajput said that, in order to achieve textual consistency, the final sentence of paragraph (13) should be amended to align it with the final sentence of paragraph (14).

Mr. Nolte (Special Rapporteur) said that there was no substantive reason for making such a change, which would constitute repetitiveness rather than consistency.

Paragraph (13) was adopted.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

Mr. Nolte (Special Rapporteur) said that Mr. Murphy had proposed the deletion of the final part of the first sentence on the grounds that it was not necessary. While he agreed that it was not strictly necessary, he thought that it did no harm and would therefore prefer to retain it.

Paragraph (16) was adopted.

Paragraphs (17) to (19)

Paragraphs (17) to (19) were adopted.

Paragraph (20)

Mr. Murphy said that a significant amount of time had been devoted to paragraph 4 of draft conclusion 13 in the first part of the session. Given the careful negotiations that had taken place, it would be preferable to reflect in paragraph (20) the wording of the draft

conclusion. To that end, the second sentence of paragraph (20) should be redrafted to read: "Paragraph 4 provides that this draft conclusion is without prejudice to the contribution that such bodies make to the interpretation of treaties under their mandates."

Mr. Nolte (Special Rapporteur) said that he could agree to the change on the understanding that that it would not lead to a general questioning of the remainder of the commentary to paragraph 4.

Paragraph (20), as amended, was adopted.

Paragraph (21)

Mr. Nolte (Special Rapporteur) said that he wished to insert a reference to the 2012 advisory opinion of the International Court of Justice on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*. In that case, the Court had recognized that 30 years of experience of the application of a particular provision of a treaty had developed that provision in a certain way. He proposed the addition of a sentence which would read: "In an advisory opinion regarding an employment case before the Administrative Tribunal of the International Labour Organization, the Court has interpreted the principle of equality of access to courts and tribunals in the light of 'the significant differences between the two general comments by the Human Rights Committee on article 14 (1) of the International Covenant on Civil and Political Rights', emphasizing that the later comment, 'adopted in 2007 on the basis of 30 years of experience in the application of article 14, gives detailed attention to equality before domestic courts and tribunals'." The inclusion of the reference to the case, which was an immediately pertinent source, would provide an important nuance to what had been said in the Diallo case.

Sir Michael Wood, supported by **Mr. Murphy**, said that the case mentioned by Mr. Nolte was less pertinent than the already quoted case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. In the latter case, the Court had expressly addressed the question of how far it was bound by decisions of human rights treaty bodies. Since footnote 643 already contained a reference to the advisory opinion Mr. Nolte had quoted, it was not necessary to include in the body of the text a long passage on it, which would only distract from the key statement in the Diallo case.

Mr. Jalloh said that adding valuable jurisprudence would serve to strengthen the commentary and as such it should be included.

Sir Michael Wood, noting that footnote 643 also made reference to the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which contained an important reference to a general comment of the Human Rights Committee, said that there was no need for an additional reference to case law.

Mr. Jalloh said that the fact that the footnote 643 contained a reference to the advisory opinion on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization* did not preclude the inclusion of a statement about that advisory opinion in the text of the commentary, especially if it lent the commentary more authority.

Mr. Nolte (Special Rapporteur) said that the reason that he had proposed to highlight the particular part of the advisory opinion that he had quoted was because it referred to 30 years of continuous application of a practice. If a practice went uncontested for so long a time, it acquired weight — that was precisely the focus of the project.

Mr. Park suggested, as a compromise, that rather than include a sentence about the advisory opinion in the body of the commentary, the reference to it in footnote 643 should be supplemented with an explanatory phrase.

The Chair said that it would be inadvisable to provide supplementary information in connection with only one reference in the footnote. He suggested that simply leaving the reference in the footnote as originally drafted was sufficient; future readers could look up the relevant sections of each reference if they so wished.

Paragraph (21) was adopted.

Paragraph (22)

Mr. Murphy, noting that footnote 644 contained a reference to the African Commission on Human and Peoples' Rights, proposed inserting, in the first sentence, the words "and bodies" after the phrase "Regional human rights courts".

Mr. Park said that although the current paragraph had been adopted without comment in the first reading, he was now of the view that the language at the beginning of the second sentence was too strong, given the paragraphs that followed. He therefore proposed replacing "Many domestic courts consider" with "There is a tendency that domestic courts consider".

Mr. Nolte (Special Rapporteur) said that he considered the second sentence to be accurate. Although Mr. Park's proposal was not vastly different in substance, the way it was expressed cast doubt on the content; he would therefore prefer to retain the sentence in its current formulation. He would like to make a proposal to supplement footnote 645 with a reference to a recent Spanish Supreme Court decision according to which the pronouncements of the Committee on the Elimination of Discrimination against Women were binding, under both international law and national law. While he was not certain that the court's view was correct in respect of international law, it was important to make mention of the case in the commentary. Having read out an excerpt of the Supreme Court decision in question, he said that he would like to supplement footnote 645 with a reference to the decision, preceded by the words "But see also".

Mr. Park said that he continued to believe that the first sentence should be amended in line with his previous proposal. In footnote 648, which related to paragraph (23), it was stated that States parties were obliged only to take account of their assessments in good faith and paragraph (24) started with the words "Court decisions have not always fully explained the relevance of pronouncements". Domestic judges would be reviewing the commentary closely and would adjust their approaches accordingly. It was therefore important to tone down the first sentence and reflect reality as accurately as possible.

Sir Michael Wood said that he supported supplementing footnote 645 with a reference to Spanish Supreme Court decision. He agreed that the language at the beginning of the second sentence of paragraph (22) was too absolute and proposed that the phrase "Many domestic courts consider" should be replaced with "Various domestic courts have considered".

Mr. Murphy said that he was not opposed to maintaining the original wording of the second sentence, but could support the proposal made by Sir Michael Wood. He would support the reference to the decision of the Spanish Supreme Court in footnote 645, so long as it was a mere citation, rather than a citation accompanied by an explanatory phrase, in which case he would like to have an opportunity to review the decision.

The Chair said that he was in favour of supplementing footnote 645 with a simple citation, as had been done with the other references in that footnote.

Mr. Saboia said that he had been satisfied with the original wording of the second sentence, but could go along with the proposal made by Sir Michael Wood.

Ms. Escobar Hernández said that she supported the proposal by Sir Michael Wood in respect of the second sentence of the paragraph. She would welcome the inclusion of the additional reference in footnote 645, without which the Commission's report on the topic would not be complete. Indeed, the case in question was relevant not only because it was so recent and had prompted a number of reactions internationally, but also because, as part of its decision, the Spanish Supreme Court had indirectly quashed the decisions of the lower courts. She suggested that, rather than preceding the citation with the words "But see", a short explanatory phrase in parentheses could be included to accompany the footnote; however, she would defer to the Special Rapporteur in that regard.

The Chair suggested that, rather than the words "But see", the phrase "See also" or another similarly neutral phrase could be used to introduce the footnote.

Mr. Nolte (Special Rapporteur) said that he agreed with the proposal by Sir Michael Wood regarding the second sentence, which should also help address the concerns

expressed by Mr. Park. He suggested that footnote 645 should be supplemented with a simple citation to the decision of the Spanish Supreme Court, preceded by the words "But see", which he did not view as problematic, since the citation related directly to the phrase, in the second sentence of paragraph (22), "while not being legally binding on them as such", and in that respect, it differed from the other cases cited in the footnote.

Paragraph (22), as amended, was adopted.

Paragraphs (23) to (25)

Paragraphs (23) to (25) were adopted.

The commentary to draft conclusion 13 as a whole, as amended, was adopted.

The Chair invited the members of the Commission to resume their consideration of the portion of chapter IV contained in document A/CN.4/L.917, with specific regard to paragraphs 11 and 12, whose adoption had been left in abeyance.

C. Recommendation of the Commission

Paragraph 11

The Chair said that the proposed recommendation, which had been circulated to the members, read:

"At its ... meeting, on ... 2018, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(a) take note of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties in a resolution, annex the draft conclusions to the resolution, and ensure their widest dissemination; and

(b) commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to interpret treaties."

Mr. Huang said that, similar to the recommendation put to the Commission during its consideration of the chapter of the report on the topic "Identification of customary international law", the recommendation on the current topic was worded ambiguously in the Chinese version so that the word "resolution" in subparagraph (a) might be understood to refer to a resolution by the Commission, rather than by the General Assembly. He proposed that the phrase "in a resolution" should be moved closer to the words "General Assembly" for the sake of clarity.

The Chair said that it was important that all language versions of important, formal decisions of the Commission, such as the current recommendation to the General Assembly, should be worded with particular care.

Paragraph 11, as amended, was adopted, subject to its completion by the Secretariat.

D. Tribute to the Special Rapporteur

Paragraph 12

Paragraph 12 was adopted by acclamation with minor editorial changes.

Mr. Huang said that he would like to join others in expressing his deep appreciation to the Special Rapporteur. However, he wished to have it placed on record that, in his view, the Commission should take effective measures to prevent its work from becoming a purely academic exercise and to avoid a tendency to produce overly and increasingly long reports on the topics under its consideration and the corresponding commentaries. Those reports in turn fed into long annual reports of the Commission to the General Assembly; Member States had already expressed their concern and dissatisfaction in that regard. One example was the Commission's Guide to Practice on Reservations to Treaties (A/66/10/Add.1), which had totalled over 450 pages, and which, according to the feedback he had received, very few legal officers around the world had ever read in its entirety. In stark contrast was

chapter V, on identification of customary international law, of the Commission's draft report on the work of its seventieth session, which came to a mere 36 pages. The quality of the latter outcome was far better than the former, with the result that valuable assistance could be provided to Member States. The Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties would have done better to cut the text of the draft conclusions and the commentaries thereto by a third or by half.

Mr. Nolte (Special Rapporteur) said that he would like to thank all those who had contributed to the work on the topic over the years, in particular the Chair and all the other members of the Commission, past and present. He mentioned the support of two past members of the Commission: Ms. Marie Jacobsson and Mr. Rohan Perera. He also thanked the Secretariat, and especially Mr. David Nanopoulos and, before him, Mr. Gionata Buzzini. Lastly, he expressed his gratitude to his assistants in the Commission and at Humboldt University Berlin, in particular to Ms. Janina Barkholdt, who had helped with the work for some years and who was present in the meeting room.

The portion of chapter IV contained in document A/CN.4/L.917, as amended, was adopted.

Chapter IV of the draft report of the Commission as a whole, as amended, was adopted.

Chapter VI. Protection of the atmosphere (A/CN.4/L.919 and A/CN.4/L.919/Add.1)

The Chair invited the Commission to consider chapter VI of its draft report, beginning with the text contained in document A/CN.4/L.919.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraph 3

Mr. Rajput proposed that, in the second sentence, the word "considered" should be deleted and the phrase "in certain situations" added at the end.

Sir Michael Wood said that, in the last sentence, the word "science-heavy" would be preferable to "scientific-heavy", and the phrase "ensure that adequate rules of procedure applied to such disputes" was very general and might be worth reviewing.

Mr. Rajput said that the word "scientific-heavy" could perhaps be replaced with "science-dependent", which was used in draft guideline 12 and the commentary thereto.

The Chair said that the paragraph would be amended in line with the proposals by Mr. Rajput. It should be left to the Special Rapporteur to review the phrase highlighted by Sir Michael Wood and make any changes necessary.

Paragraph 3 was adopted on that understanding.

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

New paragraphs 9 and 10

The Chair said that two additional paragraphs, 9 and 10, would be inserted at the end of the document. The texts of the paragraphs had been circulated among members in all the official languages of the United Nations under the symbol ILC(LXX)/INFORMAL/5. The Commission would consider the paragraphs once it had adopted document A/CN.4/L.919/Add.1.

New paragraphs 9 and 10 were left in abeyance.

The Chair invited the Commission to consider the portion of chapter VI of the draft report contained in document A/CN.4/L.919/Add.1.

C. Text of the draft guidelines on the protection of the atmosphere, together with the preamble, adopted by the Commission on first reading

1. Text of the draft guidelines, together with preamble

The Chair said that the Secretariat should harmonize the title of section C, in which the definite article was included before the word "preamble", with heading 1, in which it was omitted.

It was so decided.

Paragraph 1

Paragraph 1 was adopted.

2. Text of the draft guidelines, together with preamble, and commentaries thereto

Paragraph 2

Paragraph 2 was adopted.

Protection of the atmosphere

General commentary

Mr. Park proposed that the words "concerning the protection of the atmosphere" should be inserted at the end of the first sentence of the chapeau.

Mr. Murase (Special Rapporteur) said that, for the sake of consistency with the general commentaries to the draft texts on other topics, a new paragraph should be inserted, to read: "As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries."

It was so decided.

Mr. Tladi said that the Secretariat should ensure that the placement of the paragraph was uniform across all the topics. While he did not object to Mr. Park's proposal, he preferred the existing, broader formulation.

Mr. Vázquez-Bermúdez said that he agreed with Mr. Tladi that the first sentence of the chapeau should be left as it stood.

The chapeau of the general commentary was adopted.

Commentary to the preamble

Paragraph (1)

Mr. Murase (Special Rapporteur) said that a number of members had submitted comments to him in advance of the meeting, for which he was grateful. Mr. Tladi had proposed the deletion of the paragraph, on the grounds that the information contained therein would be of little interest to the Sixth Committee. In his view, however, it might be useful to inform delegates in the Sixth Committee that language from some controversial proposed guidelines had been moved to the preamble. He would therefore like to retain the paragraph until the second reading, with the exception of the last sentence, which could be deleted, in keeping with a proposal by Mr. Murphy.

Mr. Park said that he was in favour of deleting the last sentence.

Mr. Tladi said that he had revised his opinion concerning the deletion of the paragraph in its entirety; he continued, however, to consider the final sentence to be problematic and would support its deletion.

Mr. Rajput proposed that, in the first sentence, the words "the particular topic" should be replaced with "a particular topic".

Mr. Nolte said that, to make the second sentence clearer, the words "concerning the topic" and the phrase "with language from some guideline proposals being formulated as preambular text" should be deleted.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Tladi said that, to improve the flow of the third sentence, it should be redrafted to read: "The atmosphere is the Earth's largest single natural resource and one of its most important."

Mr. Rajput said that the source cited in footnote 7 concerned air as a natural resource. In order to strengthen the link between the footnote and the two sentences to which it related, he proposed that the words "As a natural resource" should be inserted at the beginning of the antepenultimate sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murphy said that, in footnote 8, the hyperlink pointing to the text of the Minamata Convention on Mercury should perhaps be replaced with a reference to the appropriate volume of the United Nations Treaty Series.

The Chair said that the Secretariat would review the use of hyperlinks throughout the document.

Paragraph (3) was adopted on that understanding.

Paragraph (4)

Mr. Park said that he would prefer to use more cautious language in the third sentence. He therefore proposed that the words "Scientific research reveals that" should be added at the beginning of the sentence.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Ms. Oral said that the sources cited in footnote 16 did not support the claim made in the sentence to which the footnote related. She therefore proposed replacing those sources with other, more pertinent ones.

Mr. Murase (Special Rapporteur) said that, when the Commission had adopted the commentaries in 2017, the sources cited in footnote 16 had been checked. If a review of the sources had become necessary since then, it could perhaps be conducted on second reading.

Paragraph (6) was adopted on that understanding.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

Mr. Rajput said that the last sentence was somewhat awkward and could be deleted, particularly as the Commission's decision to employ the expression "a pressing concern of the international community as a whole" was already very well explained in the sentences that preceded it.

Mr. Murase (Special Rapporteur) said that the sentence could perhaps be moved to footnote 20.

Ms. Oral said that the inclusion of the sentence was appropriate, as it helped to clarify why the Commission had opted not to use the expression "common concern of humankind", which was more frequently found in treaties than "a pressing concern of the international community as a whole".

Mr. Nolte, supported by **Mr. Ruda Santolaria**, said that the sentence had a second dimension that should be taken into account. When the Commission had discussed the expression "common concern of humankind", some members had argued that it was too strong. The Commission had subsequently decided to employ a widely used expression that, to readers unfamiliar with the Commission's terminology, might sound similar. The sentence helped such readers to understand that an effort had been made to nuance the language and, consequently, should not be hidden away in a footnote.

Mr. Vázquez-Bermúdez said that he agreed that the sentence should be located in the text of the commentary, rather than in a footnote. It would remind members of why the Commission had chosen the expression "a pressing concern of the international community as a whole" and help States to assess that choice. Moreover, it was his understanding that the expression "common concern of humankind" would be the subject of further deliberations on second reading.

Mr. Huang said that the sentence seemed excessive and unrelated to the sentences that preceded it. His preference would be to delete it altogether; however, moving it to footnote 20 would be an acceptable compromise.

Mr. Jalloh said that he supported the retention of the sentence, which provided a useful explanation, in the text of the commentary. The Commission would, in any case, revisit the text on second reading, once States had been given an opportunity to comment on it. It should be noted that the expression employed by the Commission in the fourth preambular paragraph was referred to as both "a pressing concern of the international community as a whole" and "pressing concern of the international community as a whole".

Mr. Murase (Special Rapporteur) said that, in the light of the observations made by other members, he would be in favour of keeping the paragraph as it was.

Paragraph (9) was adopted.

Paragraph (10)

Paragraph (10) was adopted.

Paragraph (11)

Mr. Tladi said that, in the first sentence, a reference should be included to the Johannesburg Declaration on Sustainable Development. He also proposed the addition of a new fourth sentence, to read: "The Johannesburg Declaration expresses the resolve to pay attention to the 'developmental needs of small island developing States and the least developed countries'." He further proposed the insertion, at the end of that sentence, of a footnote reference to paragraph 24 of the Declaration, which was the source of the quoted text.

Mr. Murphy said that, in the interests of consistency, the relevant year should be included before the reference to the Declaration in the first sentence. If appropriate, reference should also be made to the Rio+20 outcome document.

Paragraph (11), as amended, was adopted on that understanding.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

Mr. Petrič said that sea-level rise was a common concern of humankind. Some small island States and some low-lying coastal States, such as Bangladesh and the Netherlands, were particularly at risk and thus might be particularly concerned. Accordingly, special attention was paid to them in the sixth preambular paragraph and in the paragraph under discussion. The wording used was, however, a little exclusive. Certain small island States might make the transition from developing to developed, while certain low-lying coastal States that would be particularly affected by sea-level rise were already developed. He would therefore prefer to make the second sentence more inclusive by redrafting it to read: "It draws particular attention to the special situation of low-lying coastal areas and small island States, in particular developing States, due to sea-level rise."

Mr. Nguyen said that, at the end of the last sentence, the order of the phrases "coastal areas" and "small island developing States" should be inverted, as it was necessary to highlight the particular concern of small island States rather than the coastal areas of other countries.

The Chair asked whether Mr. Petrič's proposal to delete the word "developing" also affected the last sentence of the paragraph.

Mr. Petrič said that it would apply only to the second sentence.

Mr. Murase (Special Rapporteur) recalled that, at the Commission's sixty-ninth session, the question of whether to also refer to developed States had been discussed; some members had argued against doing so, as it would divert attention from developing States. He proposed updating footnote 30 by replacing the reference to the report of the International Law Association's 2016 Johannesburg Conference with a reference to the report of the Association's recent 2018 Sydney Conference.

Mr. Jalloh said that it was important to bear in mind that "small island developing States" had been recognized by the United Nations as a distinct group of developing countries facing specific social, economic and environmental vulnerabilities. The original formulation should therefore be retained; however, to accommodate the valid point raised by Mr. Petrič the words "and other States" could be added at the end of the sentence to broaden the scope.

Mr. Huang said that, while he agreed with Mr. Petrič's point, that was not the appropriate place to make it. Paragraph (13) addressed the sixth preambular paragraph, which referred to "low-lying coastal areas and small island developing States". It would therefore be inappropriate to add any further elements not provided for in the preamble.

Sir Michael Wood said that he shared the view expressed by Mr. Huang.

Mr. Ruda Santolaria said that, while he understood Mr. Petrič's concern, paragraph (13) made reference to large low-lying coastal areas, which could encompass all categories of States. It was important to highlight small island developing States since they faced an extremely serious threat to their survival due to sea-level rise. That had been one of the central considerations taken into account in the discussions on the legal effects of sea-level rise.

Mr. Petrič said that the aim of the topic was to increase awareness among States of their responsibility concerning atmospheric pollution and its consequences. It was very important for the Commission to emphasize that it was a problem faced by the international community as a whole, without minimizing the particular needs of developing countries. He would support the adoption of Mr. Jalloh's proposal, which seemed to capture his concern. He occasionally had the impression that, in the Commission, formal considerations were given more weight than substantive concerns.

Mr. Park said that Mr. Petrič had raised an important and sensitive issue. He would support the proposal put forward by Mr. Jalloh on two conditions. First, from a technical perspective, as Mr. Huang and Sir Michael Wood had mentioned, if the second sentence of paragraph (13) was amended, the Commission would have to revisit on second reading the content of the sixth preambular paragraph. Second, if the amendment was introduced in the

second sentence, it would be necessary to decide whether to also amend the last sentence of paragraph (13) to the same effect.

Mr. Vázquez-Bermúdez said that, when the sixth preambular paragraph had been drafted, the words "in particular" had been added in reference to the special situation due to sea-level rise of low-lying coastal areas and small island developing States precisely to emphasize those two groups of States, without excluding the potential impact on other States. While he understood the concerns expressed by some members, the second sentence of paragraph (13) very closely followed the text of the sixth preambular paragraph and it would therefore not be appropriate to change it. If additional elements were to be added, a new third sentence would be necessary, along the lines of: "The reference in the preamble to 'in particular' refers to the fact that other States are also affected."

Ms. Oral said that, as the group of small island developing States belonged to a broader group — the Alliance of Small Island States — Mr. Petrič's proposed amendment would not be incorrect. However, since reference was made in the sixth preambular paragraph to "small island developing States", it would be difficult to change that reference in paragraph (13). She would therefore go along with the compromise proposed by Mr. Jalloh.

Mr. Rajput recalled that, in the Drafting Committee in 2017, the more general formulation "low-lying coastal areas" had been chosen precisely to encompass any State or area affected by sea-level rise, regardless of its stage of development. Mr. Nguyen had made a valid point concerning the last sentence, and perhaps the reference to "large, heavily populated and low-lying coastal areas" might be too restrictive and could be replaced with the language of the preambular paragraph itself.

Mr. Murphy said that he was sympathetic to Mr. Petrič's point that the Commission should recognize that many different kinds of States could be affected by a failure to properly protect the atmosphere. However, in that instance, it was necessary to bear in mind that the preamble followed a sequence that must also be respected in the commentary: the fourth preambular paragraph referred to the international community as a whole, the fifth to developing countries and the sixth to low-lying coastal areas and small island developing States. If the Commission wished to comment broadly on the effects on all States, it would have to do so in the commentary to the fourth preambular paragraph. The solution proposed by Mr. Jalloh would not resolve the issue, as using the formulation "draws particular attention to" followed by "all other States" would not, in fact, be drawing particular attention to anything. He would support the text as originally drafted, but if an additional element was considered necessary, he would go along with a formulation along the lines of that proposed by Mr. Vázquez-Bermúdez.

Mr. Park said that perhaps one solution would be to move the last sentence of paragraph (14) — "The words 'in particular' are intended to acknowledge specific areas without necessarily limiting the list of potentially affected areas" — to paragraph (13) and insert it after the second sentence of that paragraph.

The Chair suggested that the first and second sentences of paragraph (13) should be amended to read: "The sixth preambular paragraph acknowledges one of the most profound impacts of atmospheric degradation for all States, that is the sea-level rise caused by global warming. It draws particular attention to the situations of low-lying coastal areas and small island developing States."

Mr. Tladi said that he supported the Chair's proposal.

Mr. Petrič said that he also agreed with the Chair's proposal.

Paragraph (13), as amended by the Chair, was adopted.

Paragraphs (14) to (16)

Paragraphs (14) to (16) were adopted.

Paragraph (17)

Mr. Tladi proposed the deletion of the last sentence of the paragraph, as it was not appropriate at that stage of the Commission's work to indicate there or elsewhere in the document that it would be revisiting such matters.

The Chair said that he agreed, as it was understood that the version adopted on first reading was, by definition, susceptible to revision on second reading.

Mr. Murase (Special Rapporteur) said that the content of the last sentence of paragraph (17) had originally been in a footnote to the eighth preambular paragraph; he considered it to be of special significance and wished to retain it.

Mr. Nolte said that he supported the position of the Special Rapporteur. While it was true that, in principle, everything adopted on first reading was subject to revision on second reading, there were certain matters that the Commission had specifically agreed that it would review. The Special Rapporteur was entitled to have a few references to those points, which would also draw the attention of States to issues that were considered relevant by him.

Mr. Murphy said that he agreed with Mr. Tladi's proposal. While that information had previously been contained in a footnote, the Commission had now moved on to a different stage of its work on the topic and had deleted the footnote during the *toilettage* in the first part of the session. The Commission had now taken the decision about the location and terminology of the paragraph, so that sentence was no longer necessary. Obviously, changes might be made on second reading, but the Commission was not yet at that point. While he was sympathetic to the Special Rapporteur's position, that sentence seemed to send a signal to the Sixth Committee that the Commission had not finished the process, when in fact it had finalized a full first draft, which would be reviewed as a whole in two years' time based on the views of States.

Mr. Murase (Special Rapporteur) said that it had been his understanding that the footnote accompanying the preamble itself would be deleted but that the sentence would appear in the commentaries so that it could be brought to the attention of delegates in the Sixth Committee. He hoped that the sentence would be retained and that the Commission could discuss the matter on second reading.

Mr. Tladi said that, although he understood the Special Rapporteur's concern and agreed with him on the substance of the issue, that sentence did not actually make a substantive point and seemed strange and out of place in that paragraph. He would be interested to know whether there was any example of the Commission's having previously included such a statement on any topic finalized on first reading.

Mr. Nolte said that he was confident that there would be a precedent for including such a statement at least in a footnote.

The Chair said that, even if no precedent existed, the Commission could start a new one. He took it that the Commission wished to move the last sentence of the paragraph to a footnote.

It was so decided.

Paragraph (17), as amended, was adopted.

The meeting rose at 12.55 p.m.

Provisional

For participants only

18 October 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3449th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 8 August 2018, at 3 p.m.

Contents

Draft report of the Commission on the work of its seventieth session (*continued*)

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Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VI. Protection of the atmosphere (*continued*) (A/CN.4/L.919 and A/CN.4/L.919/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VI of its draft report contained in document A/CN.4/L.919/Add.1.

Commentary to draft guideline 1 (Use of terms)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to draft guideline 1 as a whole was adopted.

Commentary to draft guideline 2 (Scope of the guidelines)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murase (Special Rapporteur) said that paragraph (2) had been inserted to address concerns expressed during previous discussion of the commentary; on reflection, however, he felt it did not add anything to the text and should be deleted.

The Chair said he took it that the Commission agreed to that suggestion.

Paragraph (2) was deleted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

Mr. Tladi said that he would like the following sentences to be added at the end of paragraph (6), which referred to the understanding of the Commission that had been reached when the topic had been included in its programme of work at the sixty-fifth session in 2013: "It should be emphasized that the decision of the Commission not to address the concepts in paragraph 2 in no way reflects the Commission's view of the legal status of these concepts. Moreover, some members of the Commission expressed the view that the Commission ought to have addressed these concepts." Such an addition would reflect the usual practice of the Commission when divergent views were held on a text submitted for adoption on first reading.

Mr. Jalloh, expressing support for the thrust of Mr. Tladi's proposal, suggested that either the paragraph should be deleted or a single, simpler sentence should be added, to read: "This is without prejudice to the status of those principles under international law."

Sir Michael Wood said that he had no objection to adding the first sentence proposed by Mr. Tladi. Referring to "legal status", rather than just "status", as suggested by Mr. Jalloh, was preferable as it could be understood to include domestic law as well. The second sentence proposed by Mr. Tladi, however, was more problematic as it appeared to contradict the understanding of the Commission that was the focus of the paragraph.

Mr. Saboia said that he could accept either proposal; in view of Sir Michael Wood's comments, Mr. Jalloh's suggestion might be better.

Mr. Murphy said that he disagreed with that view, as the sentence proposed by Mr. Jalloh characterized everything listed in draft guideline 2 (2) as "principles of international law", which in his opinion was incorrect. With regard to Mr. Tladi's proposal, he agreed with the comments made by Sir Michael Wood. Alternative wording would be needed, in line with previous discussions of the Commission concerning how to reflect the fact that views within the Commission differed on certain issues.

Mr. Tladi said that it was normal practice for strongly held minority views to be reflected in the commentaries to draft texts, even when the members concerned had joined consensus on decisions with which they felt uncomfortable. Not to mention such views was potentially misleading. While Mr. Jalloh's proposal was in line with his own, it was less explanatory.

Mr. Murase (Special Rapporteur) said that, while it would have been preferable to address the issue on second reading rather than at the current stage, he appreciated Mr. Tladi's proposed addition and would support it. However, the basic problem with draft guideline 2 (2) was that it did not make sense because of the implied double negative in the wording "the present draft guidelines do not deal with, but are without prejudice to", as highlighted in discussions of the Sixth Committee.

Mr. Jalloh said that it was more appropriate for divergent views to be expressed and problems tackled when texts were submitted for adoption on first, rather than second, reading. He had disagreed with the understanding reached by the Commission in 2013 as it excluded relevant environmental principles from the topic of protection of the atmosphere. The concern expressed by Mr. Murphy might be addressed by altering Mr. Tladi's second proposed sentence to begin: "The view was expressed that …"

Sir Michael Wood said that he wished to place on record that the understanding reached by the Commission in 2013 had been fundamental to the topic's inclusion in the Commission's programme of work and that, were that understanding to be reopened, there would be no basis for continuing work on the topic.

Mr. Murphy, expressing support for Sir Michael Wood's remarks, said that the first sentence proposed by Mr. Tladi suggested that the Commission had taken a view on the concepts in question. To avoid such an interpretation, he suggested that the words "in no way reflects the Commission's view of the legal status" in that proposal should be changed to "in no way indicates a view as to the legal status". It would be acceptable to him to reword the beginning of Mr. Tladi's second proposed sentence as Mr. Jalloh had suggested.

Mr. Nolte, supported by **Mr. Vázquez-Bermúdez**, proposed that the word "concepts" in the text proposed by Mr. Tladi should be altered to "concepts and principles".

Mr. Tladi said that his choice of term had been deliberate; while he believed the concepts referred to were indeed principles, he had sought to avoid debate on that point.

Mr. Murase (Special Rapporteur) proposed the alternative term "questions", which would be in line with the wording of draft guideline 2 (2).

Mr. Nolte said that the proposal by the Special Rapporteur went in the right direction. The Commission should try to find a general term, such as "questions" or "aspects", that did not prejudge the normative character of the matters concerned. Even the word "concepts" had certain legal implications.

Mr. Murphy said that he supported the Special Rapporteur's proposal.

The Chair said he took it that the Commission agreed to insert Mr. Tladi's two proposed sentences, as further amended by Mr. Jalloh, Mr. Murphy and Mr. Murase, at the end of paragraph (6).

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Nguyen said that he wished to draw attention to a discrepancy between the fourth sentence of paragraph (7), which referred to article 1 of the Convention on International Civil Aviation, and the text of footnote 66, which was placed at the end of that sentence but mentioned only article 2 (2) of the United Nations Convention on the Law of the Sea. He suggested that a reference to article 1 of the Convention on International Civil Aviation should be added at the beginning of the footnote.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Mr. Park said that it would be preferable for the scientific information contained in the first two sentences of paragraph (8) to be moved to the footnotes; it could be merged with existing footnote 67, for example. Although the Commission had adopted paragraph (3) of the commentary to draft guideline 1, which contained a substantial amount of scientific material, the current paragraph (8) seemed to follow a slightly different approach from that taken in the above-mentioned paragraph (3).

Mr. Murase, recalling that the Commission had debated the issue at some length in 2015 and that requests had also been made for background information to be included in the commentaries during discussion of the draft text in the Sixth Committee, said that he could not accept Mr. Park's suggestion.

Paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to draft guideline 2 as a whole, as amended, was adopted.

Commentary to draft guideline 3 (Obligation to protect the atmosphere)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Tladi suggested that paragraph (4) should be deleted entirely, as it gave the impression that the Commission was uncertain of its position; moreover, the connection between the paragraph and draft guideline 3 was not obvious, and no authority was cited for the two views expressed therein.

Mr. Murase (Special Rapporteur) said that the paragraph was a balanced text, taking into account the views expressed during extensive discussion of obligations *erga omnes* in 2016, and should be retained. If necessary, it could be revised during the second reading of the commentary.

Paragraph (4) was adopted.

Paragraph (5)

Ms. Oral said that the definition of due diligence given in paragraph (5) was not fully aligned with existing case law, in particular the standard set in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. She suggested that the fourth sentence of the paragraph should be replaced with the following text: "Due diligence is an obligation that requires the State to adopt appropriate rules and measures, and to exercise also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private entities (operators). It also requires taking into account the context and evolving standards of both regulation and technology." The last

sentence of the paragraph would then be deleted, having essentially been incorporated into the new text.

Mr. Rajput said that the legal principle of due di'igence was well described in the paragraph but that further relevant citations in a footnote would be useful. They could include reference to paragraphs (7) to (18) of the commentary to article 3 of the Commission's 2001 articles on prevention of transboundary harm from hazardous activities, the International Law Association's 2016 resolution on due diligence in international law, *Pulp Mills*, the *Corfu Channel* case and the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*.

Mr. Murase (Special Rapporteur), welcoming both suggestions, said that reference might also be made to the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, which had been discussed in his third report.

Mr. Rajput said that, while he liked the second sentence proposed by Ms. Oral, he had some concerns regarding the first.

The Chair said that Ms. Oral's proposal should be circulated informally in writing before the Commission discussed it further.

Mr. Murphy said that he would also like to the see the written text of the footnote that Mr. Rajput had proposed.

The Chair said he took it that the Commission wished to leave paragraph (5) in abeyance and to request the Secretariat to circulate the proposed amendments informally in writing in order to facilitate the Commission's work.

It was so decided.

Paragraph (6)

Mr. Murase (Special Rapporteur) said that Mr. Tladi had suggested that a new footnote should be added to the end of the last sentence, which currently stated that the phrase "prevent, reduce or control" drew upon formulations contained in the United Nations Convention on the Law of the Sea and the United Nations Framework Convention on Climate Change. He had consulted the United Nations Framework Convention on Climate Change, but the exact words "prevent, reduce or control" did not appear in that instrument. For that reason, he proposed that the last sentence should end with the reference to the United Nations Convention on the Law of the Sea and that footnote 74 should be supplemented with a new sentence that read: "The United Nations Framework Convention on Climate Change has a similar provision in article 3, paragraph 3, which reads: 'The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.'"

The Chair said that it would be preferable to retain a reference to the United Nations Framework Convention on Climate Change in the body of the text. The Special Rapporteur and the Secretariat could amend the text as appropriate to ensure that the characterization of the language of that instrument was accurate.

Paragraph (6) was adopted on that understanding.

Paragraph (7)

Paragraph (7) was adopted.

Commentary to draft guideline 4 (Environmental impact assessment)

Paragraph (1)

Mr. Tladi said that, in his view, there was a qualitative difference between the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* and that concerning *Pulp Mills on the River Uruguay* in terms of the recognition of environmental impact assessments. He proposed that the text that followed footnote marker 84 should be replaced with three new sentences that would read:

> "In 2010, the Court in the case concerning *Pulp Mills on the River Uruguay* stated that the requirement for environmental impact assessments 'has gained so much acceptance among States that it may now be considered a requirement under general international law … where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context'. Moreover, the 2011 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea advisory opinion on the *Responsibilities and Obligations of States with Respect to Activities in the Area* held that the duty to conduct an environmental impact assessment arises not only under the United Nations Convention on the Law of the Sea and its related instruments, but is also a 'general obligation under customary international law'. Similarly, the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* alluded to the importance of environmental impact assessment."

That proposal would make it necessary to rearrange the footnote markers and to ensure that the footnotes themselves contained the appropriate references.

Sir Michael Wood said that he would like to see the written text of Mr. Tladi's proposed amendment.

The Chair said he took it that the Commission wished to leave paragraph (1) in abeyance and to request the Secretariat to circulate the proposed amendment informally in writing.

It was so decided.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

Mr. Tladi proposed that, in order to ensure that the reference to the *Pulp Mills* case was relevant to the broader issue addressed in the paragraph, the last sentence should be amended to read: "In the *Pulp Mills* case, the Court indicated that the threshold for triggering the duty to conduct an environmental impact assessment was 'significant adverse impact in a transboundary context'." It would not be necessary to amend the reference in the footnote.

The Chair said that, once again, a written text would need to be circulated informally. He took it that the Commission wished to leave paragraph (4) in abeyance and to request the Secretariat to circulate the proposed amendment informally in writing.

It was so decided.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Commentary to draft guideline 5 (Sustainable utilization of the atmosphere)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft guideline 5 as a whole was adopted.

Commentary to draft guideline 6 (Equitable and reasonable utilization of the atmosphere)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft guideline 6 as a whole was adopted.

Commentary to draft guideline 7 (Intentional large-scale modification of the atmosphere)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Nguyen said that the second sentence was unclear. He proposed that it should be specified in that sentence that the activities that were prohibited under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques and Protocol I additional to the Geneva Conventions of 1949 were military in nature. In addition, he proposed that the last sentence of the paragraph should be deleted.

Mr. Murase (Special Rapporteur) said that the last sentence of the paragraph was important.

The Chair said that it was not necessary to delete the last sentence.

Mr. Vázquez-Bermúdez said that the military nature of the activities prohibited under the instruments in question was self-evident.

Mr. Park said that the last two sentences of the paragraph addressed specific concerns that Commission members had raised in the plenary and in the Drafting Committee and should not be deleted.

Sir Michael Wood said that one way of addressing Mr. Nguyen's concern would be to insert the words "those prohibited" after "such as" in the second sentence. There was no need to insert the word "military", as the type of activities prohibited under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques was made explicit in the title of that instrument.

Mr. Ouazzani Chahdi proposed that a footnote containing examples of activities that were prohibited by international law but were not covered by the draft guidelines should be added to the paragraph.

Mr. Murphy said that the written text of the proposed footnote should be circulated informally.

Mr. Vázquez-Bermúdez said that Sir Michael Wood's proposal already addressed Mr. Nguyen's concern. There was no need for an additional footnote.

Sir Michael Wood said that the paragraph was already sufficiently clear. The existing footnotes contained references to the relevant articles of the instruments mentioned in the body text.

Mr. Ouazzani Chahdi said that he withdrew his proposal.

Paragraph (5), as amended by Sir Michael Wood, was adopted.

Paragraphs (6) to (12)

Paragraphs (6) to (12) were adopted.

The commentary to draft guideline 7 as a whole, as amended, was adopted.

Commentary to draft guideline 8 [5] (International cooperation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Tladi said that the inclusion of the words "flexibility and latitude" in the second sentence might give the impression that it was for individual States to determine the extent of their obligation to cooperate. He proposed that the sentence should be amended to read: "The phrase 'as appropriate' implies that the precise scope and application of the duty will depend on each particular circumstance."

Sir Michael Wood suggested that the deletion of the words "and latitude" might be a simpler way of addressing Mr. Tladi's concern.

Mr. Murase (Special Rapporteur) said that he accepted Sir Michael Wood's suggestion. It was explained in the following sentence of the paragraph that, depending on the situation, such cooperation could vary in terms of the form that it took.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

Paragraph (7)

Mr. Nolte proposed that it should be specified in footnote 119 that the draft articles on protection of persons in the event of disasters had been adopted on second reading.

Paragraph (7) was adopted, with an amendment to footnote 119.

Paragraphs (8) to (13)

Paragraphs (8) to (13) were adopted.

The commentary to draft guideline 8 [5] as a whole, as amended, was adopted.

Commentary to draft guideline 9 (Interrelationship among relevant rules)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Sir Michael Wood said that the last sentence was unclear and could perhaps be deleted, unless it was a really important statement.

Mr. Nolte proposed that, in order to make that sentence clearer, the clause "identification of customary international law itself is considered a prerequisite" could perhaps be replaced with "caution is required when identifying customary international law".

Mr. Murase (Special Rapporteur) said that the use of the word "identified" in paragraph 1 of the draft guideline had been questioned in the Drafting Committee. Paragraph (3) was therefore intended to explain the meaning of that word in relation to the

interpretation and application of rules of treaty law or customary international law. The point of the final sentence was to indicate that, before interpreting rules of customary international law, those rules must be identified. It was important to make that point and, therefore, to retain the second sentence.

Sir Michael Wood asked whether it would be acceptable to include a footnote reference to the draft conclusions on identification of customary international law.

The Chair said that it was probably not necessary to include such a reference.

Paragraph (3), as amended by Mr. Nolte, was adopted.

Paragraphs (4) to (17)

Paragraphs (4) to (17) were adopted.

The commentary to draft guideline 9 as a whole, as amended, was adopted.

Commentary to draft guideline 10 (Implementation)

Paragraph (1)

Mr. Nolte said that the meaning of the second sentence was unclear and could perhaps be deleted or else redrafted in order to clarify it. If it was deleted, he proposed the addition of a sentence at the end of the paragraph that would read: "Such measures may be designated by different terms in different agreements."

Mr. Murase (Special Rapporteur) said that the original second sentence had included the words "and compliance" after the word "implementation"; however, since the subject of paragraph (1) was implementation, it had been suggested that the word "compliance" should be deleted. A parallel sentence, which referred to the word "compliance", had been included in paragraph (1) of the commentary to draft guideline 11. He suggested that the sentence under consideration should revert to its original formulation.

Mr. Rajput said that he was in favour of retaining the current formulation of the sentence. In any case, in the third sentence, a description was given of the meaning that the Commission intended to assign to the word "implementation" in the current context.

Mr. Nolte said that, if the word "use" in the second sentence was replaced with the word "meaning", then the sentence would be easier to understand.

Mr. Murase said that he did not see much difference between the words "use" and "meaning" in that context and could accept either one. He agreed with the addition of the sentence proposed by Mr. Nolte at the end of the paragraph.

Mr. Šturma, supported by **Mr. Murphy** and **Mr. Jalloh**, said that he was not sure that the term "compliance" should be inserted in paragraph (1), since the issue would be dealt with in the commentary to draft guideline 11.

Mr. Park proposed the deletion of the second sentence because it created confusion.

Mr. Murase (Special Rapporteur) said that he could agree to the deletion of the second sentence from paragraph (1), but suggested that it should be transposed to the beginning of footnote 165.

Mr. Ruda Santolaria said that it was unnecessary to move the second sentence to footnote 165 since, even with its deletion from paragraph (1), it was clear from the remainder of the paragraph what was meant by the term "implementation".

Mr. Murase (Special Rapporteur) said that the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987, which had established an implementation committee that oversaw compliance with the Protocol, was one example in which the terms "implementation" and "compliance" had been confused. For that reason, he considered it necessary to include a statement along the lines of the second sentence.

The Chair said that, since the Commission had taken the trouble to draft two guidelines with separate commentaries, one on implementation and one on compliance, it obviously assumed that they referred to different concepts. Paragraph (1) of the commentary to draft guideline 11 indicated that draft guideline 11 complemented draft guideline 10 on national implementation and referred to compliance at the level of international law. A reference to the terms "implementation and compliance" in a draft guideline on implementation would be more confusing than enlightening to readers.

Mr. Jalloh said that a review of paragraph 11 of the Special Rapporteur's fifth report (A/CN.4/711) spelled out the distinction between the two terms very clearly; it was therefore best not to include both in the current paragraph so as to maintain the parallelism between the wording of draft guidelines 10 and 11.

Mr. Murase (Special Rapporteur) suggested an alternative to the second sentence that would read: "The term 'implementation' is sometimes confused with 'compliance' in agreements and literature."

Sir Michael Wood proposed that, for the sake of clarity, the word "national" should be inserted before the word "implementation" in the first sentence and that a new second sentence could be inserted that would read: "Compliance at the international level is the subject of draft guideline 11." A new paragraph (2) would then follow with the remaining sentences of paragraph (1).

Paragraph (1), as amended by Sir Michael Wood, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Park proposed the deletion of the words "and intrinsic" from the final sentence.

Mr. Nolte proposed that, in the final sentence, the word "should" was inappropriate since the sentence referred to obligations. He therefore proposed the replacement of the phrase "should faithfully be implemented" with "need to be faithfully implemented".

Mr. Rajput proposed that, in the first sentence, the word "certain" should be replaced with the word "relevant".

Paragraph 3, as amended, was adopted.

Paragraph (4)

Mr. Rajput proposed, first, that the third and fourth sentences should be deleted and that the entire contents of paragraph (6) should be brought up to replace those two sentences. Secondly, he proposed that the final sentence should be redrafted to read: "This includes implementation undertaken by regional organizations such as the European Union". Lastly, he proposed to retain footnote 168.

Mr. Nolte suggested that, in the first sentence, the word "may" should be deleted, because in some cases the parties must take measures. If the third sentence was retained, the words "as such" should be deleted, because they did not add anything. As, like Mr. Rajput, he found the final sentence rather complicated, he proposed recasting it to read: "This also applies to obligations of regional organizations such as the European Union".

Sir Michael Wood said that, in the first sentence, the formulation "at the national level" would be better than "at their national level". In the second sentence, it was not necessarily accurate to say that forms of implementation were regulated by the national constitution of each State, because that was not the case in some States. Although it would be more accurate to say that forms of implementation were "governed by the national law of each State", the second sentence could be deleted and paragraphs (4) and (6) combined in order to avoid repetition.

Mr. Petrič said that he could not agree to the deletion, in the first sentence, of the word "may" if paragraphs (4) and (6) were combined.

Mr. Rajput said that he did not agree with Sir Michael Wood's proposed new wording for the second sentence, as many countries had a written constitution which did regulate implementation. He could understand that the reference to "all these forms of implementation", without any further explanation, made the location of the sentence problematic. As the sentence was, however, important in the context of national implementation, he proposed that it should be moved to the end of paragraph (6).

Mr. Ruda Santolaria said that, while it was essential to retain a reference to the constitution and the national legal system, he concurred with Sir Michael Wood that the implementation of international agreements was not directly regulated by the national constitution. Perhaps the idea could be saved by referring, in the first sentence, to the measures which States might take to make international agreements operative in accordance with their constitution and their national legal system.

The Chair invited Mr. Rajput and the Special Rapporteur to draft a text for submission at the following meeting. He took it that the Commission therefore wished to leave that paragraph in abeyance.

It was so decided.

Paragraph (5)

Mr. Nolte said that, in the second sentence, it would be appropriate to insert the words "as such" after "not". The meaning of the last sentence would be made clearer by replacing "are not comprehensive of" with "are not dealing comprehensively with".

The Chair said he understood that the Special Rapporteur agreed to those amendments.

It was so decided.

Sir Michael Wood asked whether, in the first sentence, it was necessary to state that the use of the term "obligations" was not intended to impose new obligations on States or create new obligations for them. Surely, it would be sufficient to say that it was not intended to impose new obligations on States.

Mr. Park recalled that, when the Chair of the Drafting Committee had presented his report, he had said that the Special Rapporteur had explained that the provision did not impose or create new obligations on States; rather, it referred to existing obligations under international law.

Mr. Murphy said that, in the light of that explanation, the best solution would be to delete the phrase "new obligations on States", so that the sentence would read "is not intended to impose or create obligations for States".

Sir Michael Wood said that, in defence of the Chair of the Drafting Committee, the latter was only quoting the Special Rapporteur on that point. The amendment suggested by Mr. Murphy was not English. Obligations could not be imposed for States, they could be imposed on States. He failed to see the difference between imposing obligations on States and creating new obligations for States.

Mr. Nolte said that he agreed with Sir Michael Wood that the Commission should be careful about the way it used the very strong word "impose".

Mr. Murphy said that it was quite clear that the Commission was not intending to impose obligations on States by virtue of the draft guideline, nor was it creating new obligations for them. He therefore proposed the reformulation "intended to impose obligations on States or to create new obligations for them".

Mr. Jalloh (Chair of the Drafting Committee) said that the amendment proposed by Mr. Nolte which included the words "as such" closely tracked the language used in the

report of the Chair of the Drafting Committee. The Committee had not tried to suggest that the draft guidelines would create new obligations, but at the same time it had not wanted to touch on obligations that might already exist for certain States. For that reason, he was happy with the amendments suggested by Sir Michael Wood and Mr. Nolte.

Mr. Nolte, addressing a more general point, said that, like Sir Michael Wood, he failed to see the difference between creating a new obligation and imposing an obligation. The Commission could not create new obligations for States, but it could point to existing obligations. The term "impose" might give rise to misunderstandings; the expression "create" was sufficient.

Sir Michael Wood said that, as the sense of the phrase was clear because of what followed, the sentence could be simplified by saying: "The use of the term 'obligations' in paragraph 1 does not refer to new obligations, but rather refers to existing obligations that States already have."

Mr. Murase (Special Rapporteur) said that he agreed with the amendment proposed by Sir Michael Wood.

Paragraph (5), as amended by Mr. Nolte and Sir Michael Wood, was adopted.

Paragraph (6)

Mr. Murase (Special Rapporteur) said that he would consult with Mr. Rajput on how best to combine paragraphs (4) and (6).

The Chair said that he took it that the Commission therefore wished to hold paragraph (6) in abeyance.

It was so decided.

Paragraph (7)

Sir Michael Wood, supported by **Mr. Murphy**, said that, in the last sentence, it was rather odd to state that paragraph 2 "requires" that States should endeavour to give effect to the recommendations contained in the draft guidelines. It would be more apt to say that paragraph 2 "provides" that States should endeavour.

Mr. Rajput, supported by **Mr. Murphy**, suggested the deletion of the phrase "although not entirely felicitous" because it was superfluous in that context and seemed to cast doubts on the Commission's choice of language.

Mr. Nolte said that, in the second sentence, the phrase "in their formulation" was unnecessary. The sentence could end after the word "should" and the new sentence which followed could read: "This is without prejudice to any normative content which any of the draft guidelines may have under international law."

Paragraph (7) was adopted with those amendments.

Paragraph (8)

Mr. Park said that the Drafting Committee and the members who had spoken in the debate in the plenary had been against any mention of State responsibility in the draft guidelines. The Drafting Committee had taken the view that the paragraph in question was unnecessary for the purposes of the draft guideline and that, even if it were framed as a "without prejudice" clause, it would unbalance the text of the draft guidelines and would not do justice to a subject that the Commission had taken many years to complete. He therefore wondered if it was appropriate to include the Special Rapporteur's original proposal in footnote 170; he suggested that paragraph (8) should be deleted in its entirety, along with footnote 170.

Sir Michael Wood said that it would be a good idea to retain the paragraph subject to a number of amendments. In the first sentence, the phrase "the subject of" could be

deleted. In footnote 170, the actual text of the proposal should be deleted, to leave only the reference to the Special Rapporteur's fifth report. The second sentence should be amended to read: "In the main, it was considered that the secondary rules of responsibility were a subject that the Commission had already dealt with, adopting in 2001 the articles on responsibility of States for internationally wrongful acts." In addition, the following sentence should be reformulated to read: "Those articles are equally applicable in relation to environmental matters, including protection of the atmosphere from atmospheric pollution and atmospheric degradation." It was a fact that the articles on State responsibility applied to all areas of international law, apart from those governed by *lex specialis*. The remainder of the paragraph should be deleted, because it was redundant.

Mr. Murphy said that he fully agreed with Mr. Park and agreed in part with Sir Michael Wood. The paragraph largely concerned background information which would not normally be included in commentary. The last part of the paragraph was particularly problematic.

Mr. Jalloh (Chair of the Drafting Committee) said that his report had indicated that, although the Special Rapporteur's proposal regarding State responsibility had been deleted in the light of the debate, it would be dealt with in the commentary. He agreed with the amendments proposed by Sir Michael Wood.

Mr. Petrič said that he was in favour of Sir Michael Wood's proposal, because paragraph (8), like paragraph (4) of the commentary to draft guideline 12, explained what had been accepted or not accepted by the Commission. That was a departure from previous practice, was of no interest to the reader and had no place in the commentary.

Mr. Nolte said that he supported all the amendments proposed by Sir Michael Wood, except that, in the final sentence, he would replace "matters" with "obligations".

Ms. Escobar Hernández said that she fully supported the amendments proposed by Sir Michael Wood.

Paragraph (8), as amended by Sir Michael Wood, was adopted.

Paragraph (9)

Mr. Murphy suggested the deletion of the phrase "as originally proposed by the Special Rapporteur" at the end of the first sentence, together with footnote 175.

Mr. Murase (Special Rapporteur) said that, although he agreed with the deletion of the phrase in question, footnote 175 should be retained, with the deletion of its first sentence.

Mr. Rajput, referring to footnote 174, said that the *Trail Smelter* arbitration did not relate to the extraterritorial application of national law but solely to extraterritorial harm. The reference to it should therefore be dropped, but the references to other examples of case law should be retained.

Mr. Murase (Special Rapporteur) said that he agreed with that amendment to footnote 174.

Paragraph (9) as amended and with the amendments to footnotes 174 and 175, was adopted.

The meeting rose at 6.05 p.m.

Provisional

For participants only

18 October 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3450th meeting
Held at the Palais des Nations, Geneva, on Thursday, 9 August 2018, at 10 a.m.

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Chapter VIII. Peremptory norms of general international law (jus cogens)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VI. Protection of the atmosphere (*continued*) (A/CN.4/L.919 and A/CN.4/L.919/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VI of the draft report contained in document A/CN.4/L.919/Add.1.

Commentary to draft guideline 10 (Implementation)

Paragraph (9)

Mr. Park, recalling that paragraph (9) had been adopted at the Commission's 3449th meeting, said that he nevertheless wished to propose an amendment to the first sentence. Although footnote 174 cited mainly precedents involving arbitration or international dispute mechanisms, the last citation — a national law of Singapore — was the exception. Rather than give the impression that the Singaporean claim in question was legal and justified, he proposed replacing, in the first sentence, the phrase "to the extent permissible where there is a well-founded grounding in international law" with the phrase "to the extent permissible where there might be legal grounding in international law".

Mr. Saboia said that he supported the proposed amendment to the first sentence.

Sir Michael Wood said that he was not sure of the need for the paragraph, which dealt with extraterritorial application, an issue that the Commission had decided not to cover in the text. If it were to be retained, he agreed that Mr. Park's proposal was an improvement on the original drafting; he would prefer, however, to simplify it, so that the phrase in question would read "to the extent permissible under international law".

Mr. Murase (Special Rapporteur) said that he thought it was important to keep paragraph (9). He agreed with Sir Michael Wood's proposed amendment to the first sentence and noted that the Commission members had agreed, when adopting the sentence at the 3449th meeting, that the phrase "as originally proposed", at the end of the first sentence, should be deleted and that footnote 175 should be amended to read simply "See the Special Rapporteur's fifth report (A/CN.4/711), para. 31".

Mr. Nguyen said that he had reservations about footnote 176, in that it cited a paper published by the Special Rapporteur prior to the Commission's debate of the matter to which the footnote related. Such a discrepancy might confuse readers.

The Chair said that, in his view, the paper cited in footnote 176 merely illustrated the position adopted by the Commission.

Mr. Jalloh said that he supported Sir Michael Wood's proposed amendment to the first sentence. As for footnote 176, related to the position taken by the Commission on the matter of extraterritorial application of national law by a State, he agreed that it should not cite a source that preceded the Commission's consideration of the matter. He suggested that the footnote might begin with the words "See also", rather than simply "See", and make clear that it referred to an academic contribution that matched the Commission's position.

Mr. Vázquez-Bermúdez said that it was helpful to include a scholarly contribution; there was no need to qualify it as such because it was self-evident.

Mr. Petrič said that he did not have a problem with footnote 176, so long as it was made clear that the scholarly paper by Mr. Murase was just that and did not necessarily represent the collective position of the Commission as a whole. More generally, however, it was obvious that the commentaries to any outcome of the Commission were mainly the product of the Special Rapporteur's work, as supported collectively by the Commission. It would therefore be unacceptable to include a reference in which the Special Rapporteur — or any individual member of the Commission, for that matter — disagreed with the stance adopted by the Commission as a whole.

The Chair said that, although he wished to acknowledge the concerns expressed by Mr. Petrič, the current juncture was not the time to enter into a debate on such matters of general import. The Commission had already adopted commentaries that contained footnotes citing academic contributions by the Special Rapporteur that reflected the position of the Commission, as in footnote 176, and while it was not the Commission's general practice to do so, they were not problematic in his view. It would be a different matter altogether if the article cited in footnote 176 reflected a position that was inconsistent with the Commission's.

Mr. Murase (Special Rapporteur) said that, in order to accommodate the concerns raised, he proposed moving the content of footnote 176 to the end of footnote 174.

Mr. Nolte said that it had been the Commission's practice, in its consideration of other topics, to include relevant academic contributions of the Special Rapporteur.

Ms. Galvão Teles (Rapporteur) said that she supported the Special Rapporteur's proposal to move the content of footnote 176, as it appeared to be the placement, rather than the content itself, that posed a problem.

Mr. Ouazzani Chahdi said that, in his opinion, the problem lay in the formulation of the footnote, not in its placement. The usual formulation when referring to academic contributions was a phrase along the lines of "See for more details".

The Chair, noting that changing the formulation of the footnote would likely necessitate a more in-depth analysis of the article cited therein, suggested that the Commission should adopt the paragraph, with the following amendments: in the first sentence, the phrase "to the extent permissible where there is a well-founded grounding in international law" would be replaced with the phrase "to the extent permissible under international law"; the phrase "as originally proposed" would be deleted; footnote 175 would be amended to read "See the Special Rapporteur's fifth report (A/CN.4/711), para. 31"; and the content of footnote 176 would be moved to the end of footnote 174.

Paragraph (9), as amended and with amendments to footnotes 174, 175 and 176, was adopted.

Commentary to draft guideline 11 (Compliance)

Paragraph (1)

Sir Michael Wood proposed replacing, in the fourth sentence, the words "is intended to reinforce" with "reflects". He further proposed deleting the following sentence, which, being somewhat convoluted, was superfluous, in that it merely restated the content of draft guideline 11, paragraph 1. In the sixth sentence, he suggested replacing the word "regarding" with "relating to" and the word "form" with "language". Lastly, he suggested replacing, in the seventh sentence, the phrase "later crystallize into customary international law" with "lead to the crystallization of rules of customary international law".

Mr. Nolte said that compliance, the subject of draft guideline 11, related not only to treaties and therefore to the principle *pacta sunt servanda*, but also to customary international law obligations, as spelled out in the guideline itself. He therefore proposed adding, at the end of the third sentence, the words "or other rules of international law". If that proposal were acceptable to the Commission, then the idea of reinforcing the principle of *pacta sunt servanda* would be limited. He suggested therefore that the words "in particular" might be inserted before the phrase "the principle of *pacta sunt servanda*"; alternatively, he could agree to the proposal put by Sir Michael Wood in respect of the same sentence. In addition, he suggested changing, in the seventh sentence, the word "reality" to "fact".

Mr. Park said that the seventh sentence was a very controversial one. He had consulted the chairs of relevant bodies as to the meaning of the phrase "obligations under international law", to no avail. In his recollection, it had not been decided to adopt the phrase "the broad nature", which in the current context seemed to refer not only to treaty obligations but also to *erga omnes* effects. He understood the phrase "obligations under international law" to encompass only treaty law obligations and customary international

law obligations, and not *erga omnes* effects. He would therefore prefer to delete the entire seventh sentence.

Ms. Oral said that the word "provisions" in the third sentence was too general in the context of a mechanism for compliance; she proposed replacing it with the word "obligations". Furthermore, while noting that the Special Rapporteur had already expressed his support for the amendment proposed by Mr. Nolte, it was her understanding that draft guideline 11, specifically paragraph 1, was focused on compliance with obligations under a treaty and the triggering of compliance mechanisms; it was not clear to her that that could be broadened so as to cover other rules of international law.

Mr. Rajput said that paragraph (1) was necessarily linked to treaties. It would be improper to attempt to expand its scope or to make mention of customary international law or any other obligations.

Mr. Murase (Special Rapporteur) said that his position as put forward in his fifth report on the topic had been to confine obligations to those under relevant treaties; however, in the Drafting Committee, the scope been expanded to encompass customary international law and other rules of international law. He had therefore chosen to reflect the understanding reached by the Drafting Committee.

Mr. Nolte said that, in making his proposed amendment to the third sentence of paragraph (1) of the commentary, he had not intended to expand the scope of paragraph 1 of draft guideline 11. He had merely wished to better reflect the latter, which referred to States' "obligations under international law ... including through compliance with the rules and procedures in the relevant agreements ..." and which therefore made it clear that such obligations encompassed other rules of international law.

Mr. Vázquez-Bermúdez said that he supported the statement made by Mr. Nolte.

Mr. Rajput said that, if the Commission accepted the arguments put forward by Mr. Nolte and supported by Mr. Vázquez-Bermúdez, it would be contradicting the Drafting Committee, whose report on the topic made specific reference to the principle of *pacta sunt servanda*.

The Chair said that, while the conclusions of the Drafting Committee should obviously be taken into account, the Commission's task at hand was to decide whether the commentary to the draft guideline currently under consideration was acceptable in form and content, including *vis-à-vis* the draft guideline; that was the purpose of the second reading.

Mr. Jalloh (Chair of the Drafting Committee) said that the deliberations of the Drafting Committee were necessarily a very technical, substantive process that involved compromises. In a way, then, it should not be surprising that some members who ultimately had joined the consensus in the Committee after failing to have their individual views reflected in the outcome sought to express their individual opinions in a later plenary meeting on the same subject. The statement by the Chair of the Drafting Committee on any given topic, although it might capture accurately the deliberations within the Committee, were not necessarily the last word on any matter; members should not be prohibited from expressing their opinions in a plenary meeting.

Referring to comments made by colleagues to the effect that the phrase "obligations under international law" was not explained, he said that an explanation was given in the report of the Drafting Committee, according to which the current phrase had been chosen as a position that was preferable to the one originally proposed by the Special Rapporteur, of "international law norms"; likewise, the inclusion of a reference to "*pacta sunt servanda*" had been insisted upon by members of the Drafting Committee. In view of the pressing nature of the work before the Commission, it was important not to go to the other extreme and ignore the report of the Drafting Committee, either. In the present case, nevertheless, if the Special Rapporteur agreed with the proposals made, he suggested that they should be acceptable to the Commission as a whole.

Mr. Nolte said that he would withdraw his proposal if it proved inconsistent with the report of the Drafting Committee on the topic; however, there would still be an obvious problem in the formulation of the draft guideline.

Mr. Park said that he too would withdraw his proposal if it proved inconsistent with the report of the Drafting Committee on the topic.

The Chair said he took it that the Commission wished to adopt the paragraph, with the following amendments: in the third sentence, the word "provisions" would be replaced with "obligations" and the phrase "or other rules of international law" would be inserted at the end of the sentence; in the fourth sentence, the phrase "is intended to reinforce" would be replaced with "reflects, in particular,"; the fifth sentence would be deleted; in the sixth sentence, the words "regarding" would be replaced with "relating to" and the word "form" with "language"; and, in the seventh sentence, the word "reality" would be changed to "fact" and the phrase "later crystallize into" to "lead to the crystallization" of rules of customary international law.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Ouazzani Chahdi, referring to the French version, said that the word "*chapeau*" should be replaced with "*intitulé*" or "*libellé*". The other language versions should be amended accordingly.

Paragraph (3) was adopted on that understanding.

Paragraph (4)

Mr. Nolte said that he had three language proposals. In the second sentence, the words "since those States are willing" should be replaced with "since some States may be willing". In the last sentence, the indefinite article "a" should be inserted before the words "general lack of capacity" and the definite article "the" inserted before "receipt of external support".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Nolte said that, in the first sentence, the words "provides for enforcement procedures" should be replaced with "speaks of enforcement procedures", as draft guideline 11 itself did not provide for such procedures.

Mr. Nguyen proposed that, in the last sentence, the words "to which they are parties", which appeared in draft guideline 11 (1), should be inserted after "relevant agreements".

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 11 as a whole, as amended, was adopted.

Commentary to draft guideline 12 (Dispute settlement)

Paragraph (1)

Sir Michael Wood said that, in the last sentence, the word "basis" should be used instead of "primer".

Mr. Nolte proposed that, in the third sentence, the words "omits the often quoted reference" should be replaced with "does not refer".

Mr. Jalloh said that, to simplify the penultimate sentence, it should be redrafted to read: "Paragraph 1 is not intended to interfere with or displace existing dispute settlement provisions in treaty regimes, which will continue to operate in their own terms."

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Nolte said that, in the second sentence, the word "been" should be inserted after "technical issues have", while in the third sentence, the word "been" should be deleted. In the last sentence, the word "would" and the comma that preceded it should both be removed.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Nolte proposed that, in the first sentence, the word "certainly" should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Park said that the paragraph should be deleted.

Mr. Nolte said that, in the first sentence, the word "process" should be replaced with "processes".

Mr. Petrič said that he also was in favour of deleting the paragraph, which was of little relevance to draft guideline 12. Paragraph 1 of the draft guideline was amply addressed in paragraph (1) of the commentary, while paragraph 2 was dealt with in paragraphs (2) and (3) of the commentary. It was clear that no judicial or arbitral decision could be incompatible with the principles of *jura novit curia* or *non ultra petita*. A court was bound to decide on the matter brought before it. Consequently, if the paragraph were retained, the words "may become", in the first sentence, should be replaced with "are". Furthermore, in the last sentence, the words "as originally proposed by the Special Rapporteur", which were misleading and unnecessary, should be deleted, together with footnote 191. He had, from the outset, supported the consideration of what was a very important topic and the Special Rapporteur's persistent work thereon. However, the Commission had a responsibility to handle the topic in a rational way. He would therefore appeal to the Special Rapporteur to be flexible with regard to proposed amendments and deletions.

Sir Michael Wood, supported by **Mr. Šturma**, said that he, too, would be happy to see the paragraph deleted. However, if it were retained, he agreed with Mr. Petrič that the words "as originally proposed by the Special Rapporteur" and footnote 191 should be deleted. The final sentence of that footnote should, however, be moved to the end of footnote 190.

Mr. Huang said that he was strongly in favour of deleting the paragraph. He was uncomfortable with the Special Rapporteur's repeated attempts, in the commentaries to draft guidelines 10 to 12, to include, by any means possible, controversial language that had been debated and ultimately rejected by the Drafting Committee. The decisions of the Drafting Committee were final and should be respected by the Special Rapporteur.

Mr. Cissé said that he too was in favour of deleting the paragraph, since it contributed little to an understanding of the text.

Mr. Vázquez-Bermúdez said that the paragraph contained relevant information. Having said that, he agreed with Sir Michael Wood's proposal to delete footnote 191, with the exception of the last sentence.

Mr. Murase (Special Rapporteur) said that he was willing to replace the word "process" with "processes", to remove the words "as originally proposed by the Special Rapporteur" and to delete footnote 191, with the exception of the last sentence, which could be moved to the end of footnote 190. While he did not object to Mr. Petrič's proposal to replace the words "may become" with "are", the existing wording seemed more natural.

Sir Michael Wood proposed that, in the first sentence, the words "may be" should be used instead of "may become".

Paragraph (4), as amended, was adopted.

The commentary to draft guideline 12 as a whole, as amended, was adopted.

Mr. Park said that he wished to have it placed on record that, in his view, the Commission had created an unwelcome precedent by allowing the Special Rapporteur to incorporate, in the commentaries, paragraphs on concepts that had been excluded from the draft guidelines by the Drafting Committee and the plenary.

Sir Michael Wood said that, while he tended to agree with Mr. Park, there was an advantage to retaining the paragraphs on first reading, which was that States would have an opportunity to react to the decisions made by the Commission. On second reading, the Commission might well wish to delete the paragraphs.

The Chair said that the Commission had taken the position that, on first reading, even individual opinions that were not necessarily in accord with the majority view could, if appropriate, be reflected.

Mr. Tladi said that he agreed with Mr. Park. As a matter of principle, the Commission should not treat the commentaries as an alternative text.

The Chair said that the Commission might wish to consider the idea of delaying the adoption of draft texts until it had adopted the commentaries, or potential commentaries, thereto. He invited the Commission to resume its consideration of a number of paragraphs that had been left in abeyance.

Commentary to draft guideline 3 (Obligation to protect the atmosphere)

Paragraph (5)

The Chair said that there were two proposals concerning the paragraph, from Ms. Oral and Mr. Rajput. Ms. Oral proposed the deletion of the last three sentences, and that the fourth sentence should be redrafted to read:

> "It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. It also requires taking into account the context and evolving standards of both regulation and technology."

Mr. Rajput proposed that footnote 73 should read:

> *Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports 2010*, p. 14, paras. 101 and 197; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), I.C.J. Reports 2015*, p. 665, paras. 104, 153, 168 and 228; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, Case No. 17, 1 February 2011, para. 131; International Law Commission, draft articles on prevention of transboundary harm from hazardous activities, paras. 7 to 18 at pp. 154-5; International Law Association Study Group on due diligence in international law, first report, 7 March 2014; International Law Association Study Group on due diligence in international law, second report, July 2016; J. Kulesza, *Due Diligence in International Law* (Leiden, Brill, 2016).

Ms. Oral said that her proposal for the fourth sentence was more aligned with existing case law than the text that it was intended to replace, and had been amended in consultation with Mr. Rajput.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 3 as a whole, as amended, was adopted.

Commentary to draft guideline 4 (Environmental impact assessment)

Paragraph (1)

The Chair said that Mr. Tladi had submitted a proposal in writing for three changes to the paragraph, principally to introduce the language used by the International Court of Justice in the *Pulp Mills* case and the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in its advisory opinion on the *Responsibilities and Obligations of States Regarding the Activities in the Area*. First, he proposed that the penultimate sentence should be redrafted to read:

> "In 2010, the Court in the *Pulp Mills* case stated that the requirement for environmental impact assessments 'has gained so much acceptance among States that it may now be considered a requirement' under customary international law … where there is a risk that a proposed industrial action may have a significant adverse impact in a transboundary context [para. 205]."

Secondly, he proposed that the last sentence should be redrafted to read:

> "Moreover, the 2011 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea Advisory Opinion on the *Responsibilities and Obligations of States Regarding the Activities in the Area* expressed the view that the duty to conduct an environmental impact assessment arises not only under the Law of the Sea Convention and its related instruments, but is also a 'general obligation under customary international law' [para. 145]."

Thirdly, he proposed the insertion of a new sentence at the end of the paragraph, to read: "Similarly, the International Court of Justice in the *Gabčíkovo-Nagymaros* case alluded to the importance of environmental impact assessments."

Mr. Zagaynov said that the language proposed by Mr. Tladi was not entirely precise. The text quoted in his proposal for the penultimate sentence was taken from paragraph 204, not 205, of the International Court of Justice's judgment in *Pulp Mills*. Moreover, it would be better to quote more fully from the judgment in order to remain faithful to it. Regarding Mr. Tladi's proposal for the last sentence, in the advisory opinion cited, the International Tribunal for the Law of the Sea had spoken only of the United Nations Convention on the Law of the Sea. It had made no reference to the Convention's related instruments.

Sir Michael Wood said that he was in favour of deleting the words "and its related instruments" from Mr. Tladi's proposal for the last sentence.

Mr. Tladi said that his proposal for the penultimate sentence accurately reflected the International Court of Justice's judgment in *Pulp Mills*. As to his proposal for the last sentence, while it was true that, in paragraph 145 of the advisory opinion, the Tribunal had not spoken of the Convention's related instruments, it was clear, from reading the rest of the opinion, that it had viewed the duty to conduct an environmental impact assessment as arising not only from article 206 of the Convention but also from related instruments. He would be willing, however, to delete the words "and its related instruments".

Mr. Jalloh said that, for the sake of clarity in the penultimate sentence, the following text should be quoted from the Court's judgment in *Pulp Mills*: "has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context".

Mr. Tladi said that he was happy to quote more fully from the Court's judgment, but that doing so would necessitate a further redrafting of the penultimate sentence.

Paragraph (1) was adopted on that understanding

Paragraph (4)

The Chair said that Mr. Tladi had submitted a proposal in writing to the effect that, in the last sentence, everything after the word "indicated" should be replaced with the following text: "that the threshold for triggering the duty to conduct an environmental impact assessment was 'significant adverse impact in a transboundary context'".

Mr. Zagaynov said that the Commission should give some thought to whether the threshold was the existence of a significant adverse impact, as suggested in Mr. Tladi's proposal, or the existence of a risk thereof, as the Court had stated in its judgment in *Pulp Mills*. While he did not have strong feelings on the matter, the Commission should be cautious not to interpret the Court's judgment in an inappropriate way.

Sir Michael Wood said that he agreed with Mr. Zagaynov. The Commission should quote more extensively from paragraph 204 of the Court's judgment in *Pulp Mills*, including the words "where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context".

Paragraph (4), as amended, was adopted on that understanding.

The commentary to draft guideline 4 as a whole, as amended, was adopted.

Commentary to draft guideline 10 (Implementation) (continued)

Paragraph (4) (continued)

The Chair invited the Commission to consider the new version of paragraph (4) proposed by Mr. Rajput and the Special Rapporteur, which had been circulated to members. It read:

> "The term '[n]ational implementation' denotes the measures that parties may take to make international agreements operative at the national level, pursuant to the national constitution and legal system of each State. National implementation may take many forms including in 'the form of legislative, administrative, judicial and other actions'. The word 'may' reflects the elective nature of the provision. The reference to 'administrative' actions is used, rather than 'executive' actions, as it is more encompassing. It covers possible implementation at lower levels of governmental administration. The term 'other actions' is a residual category covering all other forms of national implementation. The term 'national implementation' also applies to obligations of regional organizations such as the European Union."

Sir Michael Wood said that, for the sake of readability, the phrase "may take many forms including in 'the form of legislative, administrative, judicial and other actions'" in the second sentence could be replaced with "may take many forms, including 'legislative, administrative, judicial and other actions'". In the third sentence, the phrase "the elective nature of the provision" seemed rather obscure — was it intended to indicate that States had a choice of measures?

Mr. Nolte said that, the previous day, he had proposed replacing the word "elective" with "discretionary".

The Chair said he took it the Commission wished to adopt the proposed new paragraph, as further amended by Sir Michael Wood and Mr. Nolte.

Paragraph (4), as amended, was adopted.

The commentary to draft guideline 10 as a whole, as amended, was adopted.

The commentaries to the draft guidelines on protection of the atmosphere, as a whole, as amended, were adopted.

The Chair invited the Commission to resume its consideration of the portion of chapter VI contained in document A/CN.4/L.919.

Paragraphs 9 and 10

The Chair drew the members' attention to two proposed new paragraphs, 9 and 10, which had been distributed in all languages. It read:

> "9. At its … meeting, on … 2018, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Shinya Murase, which had enabled the Commission to bring to a successful conclusion its first reading of the draft guidelines on the protection of the atmosphere.
>
> 10. At its … meeting, on … 2018, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft guidelines on the protection of the atmosphere (see section C below), through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019."

Paragraphs 9 and 10 were adopted.

Chapter VI of the draft report as a whole, as amended, was adopted.

Mr. Murase (Special Rapporteur) said that he wished to express his gratitude to the Commission members for their sincere commitment to the topic, to the Chair for his thoughtful guidance of the discussions in the plenary and to Mr. Jalloh and Mr. Rajput for their chairing of the Drafting Committee. He also wished to thank the Secretariat, as well as his assistants and interns.

The Chair said that Mr. Murase was to be commended on the extraordinary patience and determination he had shown as Special Rapporteur.

Chapter VIII. Peremptory norms of general international law (jus cogens) (A/CN.4/L.921)

The Chair invited the Commission to consider chapter VIII of its draft report, as contained in document A/CN.4/L.921.

A Introduction

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Mr. Nolte proposed the addition of a new sentence to read: "The Commission referred the draft conclusions proposed in the reports to the Drafting Committee, where they remain pending." That would reflect more accurately what had actually happened at the sixty-eighth and sixty-ninth sessions.

Mr. Tladi (Special Rapporteur) said that he was not convinced that such an addition was necessary, as it was explained elsewhere in the chapter that the draft conclusions were intended to remain in the Drafting Committee. The paragraphs in the introduction referred to what had happened in the plenary; as the draft conclusions had not been pending in the plenary, the additional sentence would not be an accurate reflection of the situation.

Mr. Nolte said that his proposal was simply to indicate that the draft conclusions had been pending in the Drafting Committee, not the plenary.

Mr Jalloh, speaking as a member of the Commission, proposed that the paragraph should be left in abeyance pending confirmation by the Secretariat as to whether the Commission had in the past included statements in its reports to the effect that draft texts remained pending in the Drafting Committee.

Mr. Nolte said that he supported the proposal but it was important when looking at precedents to consider not just whether the Commission had indicated that texts remained pending but also whether it had mentioned texts being referred to the Drafting Committee.

The Chair said that he took it the Commission wished to hold paragraph 2 in abeyance on that understanding.

It was so decided.

Paragraph 3

Paragraph 3 was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraph 6

The Chair said that, at the request of Mr. Murphy and the Special Rapporteur, the Secretariat had drafted an amendment to paragraph 6. The proposal was to delete the full stop at the end of the sentence and to add the words "on the understanding that draft conclusions 22 and 23 would be dealt with by means of a 'without prejudice' clause."

Mr. Jalloh asked whether the proposed language reflected what the Chair had said in his statement in the plenary.

Mr. Llewelyn (Secretary to the Commission) said that, as far as he recalled, the Chair's statement at that time had referred to the summing up by the Special Rapporteur, in which that language had been used.

Paragraph 6, as amended, was adopted.

Paragraph 7

Mr. Nolte said that he had attempted to follow the link in footnote 7 to the Commission's website but had been unable to locate the reports of the Chair of the Drafting Committee. Perhaps a more precise link should be indicated in that footnote and others throughout the report.

Paragraph 7 was adopted on that understanding.

Paragraph 8

Mr. Tladi said that, at the very end of the last sentence, the words "customary international law was a source" should be replaced with "customary international law was the most common basis for *jus cogens* norms".

Mr. Nolte said that the third sentence — "while many States had agreed that there should be a 'very large majority' of States accepting and recognizing the peremptory character of a norm, some preferred a more stringent qualifier that would not be seen just from the perspective of numbers but also from the representative character of the group of States" — expressed an opposition whose existence he did not recall, although there had been a debate about whether the expression used should be a "very large majority" and about the question of representativeness. He was therefore unsure whether the summary accurately reflected what had actually happened.

Mr. Tladi (Special Rapporteur) said that his introductory statement had read:

> "Many States expressed agreement with the Drafting Committee's requirement that there should be a 'very large majority' of States accepting and recognizing the peremptory character of a norm. A few States did suggest, however, that even this qualifier could be made even more stringent. Importantly, Poland observed that the question of majority — large, very large, overwhelmingly large, etc. — should not be seen from just the perspective of numbers but also the representative character of the group of States."

In his view, that statement had been correctly and succinctly summarized. He was not wedded to the language used in paragraph 8, but it should be borne in mind that, even if the Special Rapporteur had misrepresented the situation in his introduction, that should be reflected in the summary. He would therefore not be in favour of substantively changing the paragraph.

Mr. Nolte said that it seemed that the position expressed by Poland alone had inadvertently been reflected as the position of "some States". Perhaps a more nuanced formulation could be found.

Mr. Tladi (Special Rapporteur) said that the summary provided in paragraph 8 was not incorrect. He had happened to highlight in his introduction just the statement by Poland because it was a particularly strong example, but other States, including the Russian Federation, had made the same point. However, to resolve Mr. Nolte's concern, perhaps the sentence could be reformulated to read: "Many States agreed that there should be a 'very large majority' of States accepting and recognizing the peremptory character of a norm. Some States preferred a more stringent qualifier that would not be seen just from the perspective of numbers but also from the representative character of the group of States."

Paragraph 8, as amended by the Special Rapporteur, was adopted.

Paragraph 9

Mr. Tladi (Special Rapporteur) said that Mr. Murphy had proposed that the second sentence should be amended and split in two so as to read: "He noted that draft conclusions 10, 11 and 12 were based on provisions of the Vienna Convention on the Law of Treaties of 1969 ("1969 Vienna Convention"), with the exception of paragraph 3 of draft conclusion 10, which provides for a treaty to be interpreted in a manner consistent with peremptory norms. The Special Rapporteur considered this to be a necessary consequence of article 31, paragraph 3 (c)".

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

Mr. Nolte proposed that, in the first sentence, the phrase "disputes involving conflict" should be changed to "disputes involving a conflict".

Sir Michael Wood said that, in his view, the original formulation was preferable, as it was more general.

Mr. Tladi (Special Rapporteur) said that either option would be correct but he saw no need to change the original wording.

Paragraph 11 was adopted.

Paragraph 12

Mr. Nolte said that perhaps the formulation "as regarded" should be replaced with "regarding" in that paragraph and elsewhere in the chapter.

It was so decided.

Mr. Tladi (Special Rapporteur) said that in the third sentence, the formulation "was based on article 64" should be replaced with "was inspired by". Regarding the second sentence, Mr. Murphy had made a proposal, which he supported, to reformulate the phrase "invalidate or prevent customary international law rules from coming into being" to read "invalidate customary international law rules or prevent them from coming into being".

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

Mr. Nolte proposed that, in the second sentence, the term "Security Council resolutions" should be followed by "in particular" in order to distinguish such resolutions from resolutions of international organizations in general, mentioned earlier in the sentence.

Mr. Tladi (Special Rapporteur) said that in his view, the current formulation accurately captured the introductory statement that he had made.

Paragraph 14 was adopted.

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

Mr. Tladi (Special Rapporteur) said that, in the first sentence, the word "concerning" should be replaced with "concerned".

Paragraph 17, as amended, was adopted.

Paragraph 18

Sir Michael Wood said that the advisory opinion of the International Court of Justice referred to in the second sentence as the *Legal Consequences for States* opinion should be referred to as the *Namibia* opinion throughout the document in order to distinguish it from other advisory opinions or proceedings with a similar name.

Mr. Tladi (Special Rapporteur) said that he wished to share two proposals put forward by Mr. Murphy, namely, in the fourth sentence, to replace the first occurrence of the word "or" with "nor", and, in the fifth sentence, to delete the words "a duty".

Paragraph 18, as amended, was adopted.

Paragraph 19

Mr. Tladi (Special Rapporteur) proposed that, in the second sentence, the words "given the prevailing uncertainty in State practice" should be replaced with "as the practice in this area was less settled".

Mr. Nolte, referring to the first sentence, asked whether the Special Rapporteur had used in his statement the words "based on" rather than "inspired by".

Mr. Tladi (Special Rapporteur) said that he had indeed used the words "based on".

Paragraph 19 was adopted with the amendment proposed by Mr. Tladi.

Paragraph 20

Mr. Nolte, referring to the second sentence, asked whether the Special Rapporteur had used in his statement the word "establishing" rather than "providing".

Mr. Tladi (Special Rapporteur) said that he had in fact used the word "providing". The sentence should therefore be amended to reflect his statement.

Paragraph 20, as amended, was adopted.

2. Summary of debate

(a) General comments

Paragraph 21

Mr. Nolte said that, in the third sentence, the words "it was noted" should be replaced with "some members noted", to make clear that the phrase "members generally welcomed", which appeared at the beginning of the first sentence, did not also apply to the third sentence.

Paragraph 21, as amended, was adopted.

Paragraph 22

Mr. Nolte said that the first sentence seemed to presuppose the truth of an assumption that might or might not be correct. For the sake of clarity, the words "intention to pursue a" should be inserted before "practical approach".

Mr. Tladi (Special Rapporteur) said that several members had in fact assumed, correctly or otherwise, that his approach was a practical one; the sentence was therefore an accurate reflection of the statement.

Mr. Nolte said that his concern was that there was an assumption in the sentence that it had been generally accepted that the approach was a practical one.

Mr. Jalloh said that he had been among the members who had supported what he considered to be the Special Rapporteur's practical approach. He was of the view that the current formulation was entirely appropriate.

Mr. Tladi (Special Rapporteur) said that the document under consideration should reflect what had occurred during the debate, irrespective of the accuracy of what had been said. He therefore strongly objected to Mr. Nolte's proposal, which appeared to be an attempt to change history.

Mr. Saboia said that the sentence should be retained as it stood.

Mr. Cissé said that he too was in favour of retaining the current sentence.

Sir Michael Wood said that the first sentence should not be amended. In the fourth sentence, the words "it was noted" should be replaced with "it was suggested".

Mr. Nolte said that he was certainly not attempting to change history but merely to enhance the accuracy of the paragraph. He would, however, not insist on his proposal.

Paragraph 22, as amended by Sir Michael Wood, was adopted.

Paragraph 23

Sir Michael Wood said that, in the first sentence, the word "generally" should be deleted. In the fourth sentence, it was unclear what was meant by the word "source" in the phrase "the invalidity of a particular source of international law". He wondered whether "source" should be replaced with the word "rule".

Mr. Tladi (Special Rapporteur) said that the word "rule" would be preferable, since the sentence referred to the procedures for determining whether a particular rule of international law was a treaty rule, a customary international law rule or a rule that derived from a binding decision.

Paragraph 23, as amended, was adopted.

Paragraphs 24 and 25

Paragraphs 24 and 25 were adopted.

(b) Specific comments on the draft conclusions

(i) Draft conclusion 10

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

Sir Michael Wood said that, in the first sentence, the word "while" should be deleted, and the word "norms" should be inserted after "*jus cogens*".

Paragraph 28, as amended, was adopted.

(ii) Draft conclusion 11

Paragraph 29

Sir Michael Wood said that, in the first sentence, the words "no part of" should be inserted before "a treaty", and the word "not" should be deleted.

Mr. Nolte said that, in the first sentence, the word "its" should be inserted before "conclusion".

Paragraph 29, as amended, was adopted.

(iii) Draft conclusion 12

Paragraph 30

Sir Michael Wood said that, in the first sentence, the first passage in quotation marks should be amended to read "any act in reliance of the provisions of the treaty".

Paragraph 30, as amended, was adopted.

Paragraph 31

Paragraph 31 was adopted.

(iv) Draft conclusion 13

Paragraph 32

Paragraph 32 was adopted.

(v) Draft conclusion 14

Paragraph 33

Mr. Nolte said that, since he had made several comments on draft conclusion 14, he wished to address a number of small points with a view to improving the paragraph. In the first sentence, he proposed the deletion of the word "recommended" from the phrase "the proposed recommended dispute settlement procedure". He had not proposed to delete the word "recommended" in the previous paragraph, which contained a reference to "recommended judicial settlement procedure". There were two dimensions involved: the proposed judicial dispute settlement procedure, where the question of the jurisdiction of the International Court of Justice arose and the larger question of dispute settlement by other means where the possibility of customary elements might need to be taken into account. In the second sentence, both instances of the word "invalidation" should be replaced with "invalidity", the latter being a more general term. In the fourth sentence, the words "it was questioned" should be replaced with "some members questioned". In the last sentence, the word "could" should be replaced with "would" and the final phrase should be expanded to read "or whether it would be merely declaratory".

Mr. Zagaynov said that he could not agree with Mr. Nolte's first proposal. As he had explained previously, he had some reservations with respect to the issue of the dispute settlement procedure in question being a rule of customary international law. However, as the Special Rapporteur had proposed it as recommended practice, the current language should be retained so as to reflect the debates.

Mr. Tladi (Special Rapporteur) said that he supported Mr. Zagaynov's position. While Mr. Nolte was correct that there was a larger question surrounding dispute settlement, the text under consideration should reflect the proposal that had been made, which had been termed the "recommended procedure".

Mr. Nolte said that an alternative solution would be to place the words "recommended dispute settlement procedure" in quotation marks.

The Chair said that he took it that Mr. Nolte's alternative solution was acceptable to the members.

Paragraph 33, as amended, was adopted.

Paragraph 34

Mr. Nolte said that, in his view, the paragraph did not sufficiently reflect the debate that had taken place, since it did not refer to a point he and several other members had raised with respect to the reference in the *Gabčíkovo-Nagymaros Project* case to the customary quality of articles 65 to 67 of the Vienna Convention. He wished to propose that, after the third sentence, a new sentence should be inserted to read: "In this connection it was pointed out that the International Court of Justice had noted that articles 65 to 67 of the Vienna Convention 'if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on the obligation to act in good faith'." A footnote should then be added with a reference to the source of the quote. Lastly, referring to the current fourth sentence, he wondered who had made the suggestion that State consent to the jurisdiction of the International Court was not necessary when it came to a dispute regarding *jus cogens* and whether its inclusion was warranted.

Mr. Tladi (Special Rapporteur) said that Mr. Nolte's proposal to insert an additional sentence and footnote was acceptable. With regard to the fourth sentence, the view had been expressed by Mr. Cissé and included in his own summing up of the debate; it could therefore be reflected in the paragraph.

Paragraph 34, as amended, was adopted.

Paragraph 35

Mr. Nolte said that, in the second sentence, the word "practice" should be replaced with "procedure".

Paragraph 35, as amended, was adopted.

(vi) Draft conclusion 15

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Paragraph 38

Mr. Nolte proposed that the last sentence of paragraph 38 should be deleted since, as far as he was aware, the point made therein had not been mentioned during the debate.

Paragraph 38, as amended, was adopted.

Paragraph 39

Paragraph 39 was adopted.

(vii) Draft conclusion 16

Paragraph 40

Paragraph 40 was adopted

(viii) Draft conclusion 17

Paragraph 41

Mr. Jalloh said that he wished to make a number of proposals to strengthen and clarify paragraph 41.

The Chair requested Mr. Jalloh to provide his proposals in written form so that the Secretariat could circulate them to the members for consideration at the Commission's next meeting.

The meeting rose at 1 p.m.